TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 269

AILEEN S. MITCHELL (SUCCESSOR OF C. MITCHELL, FORMER TREASURER OF FORT BEND COUNTY, TEXAS), AS TREASURER OF FORT BEND COUNTY, TEXAS, ET AL., PETITIONERS,

vs.

J. W. HAMPEL, ET AL., TRUSTEES IN BANKRUPTCY, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

(FILED)

(32,720)

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INDEX

	Original	Print
Proceedings in the United States circuit court of appeals, fifth circuit	a	1
Caption (omitted in printing)	a	
Petition to superintend and revise and order allowing same.	1	1
Assignments of error	11	7
Record from the district court of the United States, southern Texas	14	10
Stipulation re transcript of record	14	10
Note re waiver of citation	16	11
Praecipe for transcript of record	18	11
Caption (omitted in printing)	20	
Amended claim of Fort Bend County, Texas	21	12
Exhibit 1—Depository bond of J. H. P. Davis & Co. for county funds, February —, 1921	28	18

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	Original	Print
Exhibit 2—Depository bond of J. H. P. Davis & Co. for school funds, February 19, 1921	32	21
Agreement as to date of original claim of C. C. Minkwitz	34	22
Contest of J. W. Hampel et als., trustees, of claim of Fort Bend County	35	23
Exhibit A—Depository bond of J. H. P. Davis & Co. for county funds, February —, 1921	39	26
Contest of I. R. Bryan, creditor, etc., of claim of Fort Bend County	41	27
Supplemental contest of J. W. Hampel et als., trustees	44	30
Agreement correcting error in county depository bond	45	31
Agreement as to certain facts adduced at hearing before referee	49	33
Proof of claim of J. W. Shavin against J. H. P. Davis & Co. et al	51	35
Agreement as to proof of individual claims, etc	56	38
Findings of referee	58	39
Certificate of referee	59	40
Report of proceedings before referee	61	41
Offer of certain documents	61	41
Agreement as to individuals composing partnership	61	42
Testimony of T. J. Holbrook	62	42
E. Foerster	68	47
Mason Briscoe	72	50
T. J. Holbrook (recalled)	74	51
Decree of referee on claim of Fort Bend County, Texas	80	56
Petition for review of order of referee	82	57
Opinion, Hutcheson, Jr., J	89	62
Decree confirming order of referee	91	63
Petition for appeal and order allowing same	92	64
Bond on appeal (omitted in printing)	93	
Assignments of error	97	65
Clerk's certificate (omitted in printing)	101	
Note re waiver of citation	101	67
Argument and submission	102	69
Opinion, Walker, J	104	70
Judgment	108	72
Petition for rehearing (omitted in printing)	109	
Order denying rehearing	114	74
Petition for stay of mandate	115	74
Order recalling and staying mandate	118	76
Bond on stay	120	77
Supplemental order staying mandate	124	80
Bond on stay	125	81
Application of Aileen E. Mitchell for permission to prosecute cause in place of C. Minkwitz, deceased	127	83
Order granting application of Aileen E. Mitchell	129	84
Clerk's certificate	130	85
Order allowing certiorari	131	86

[fols. a & b] [Caption omitted]

[fols. c & 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 1527. In Bankruptcy

In the Matter of J. H. P. Davis & Company, Bankrupt

Petition to Superintend and Revise and Order Allowing Same

To the Honorable Clerk of the Fifth Circuit Court of Appeals, sitting in New Orleans, Louisiana:

Now in the above styled cause and matter come J. W. Hampel, George Hamman, T. J. Holbrook, as trustee for J. H. P. Davis & Company, and come also I. R. Bryan and other creditors, and file this, their petition for review and represent as follows:

I

That heretofore, to-wit: in February, 1921, J. H. P. Davis & Company, bankers, unincorporated of Fort Bend County, Texas, who had been chosen as county depository of Fort Bend County, Texas, executed a bond under the requirements of Chapter 2, Acts of the Thirty-fifth Legislature, by the terms of which it obligated itself to pay to the County Judge of Fort Bend County, Texas, the sum of Three Hundred Thousand ($300,000.00) Dollars, and conditioned as required by law, J. H. P. Davis & Company signed their name as principal and thereafter J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff, E. Foerster, T. B. Wessendorff, T. W. Davis, R. S. Darst, A. P. George, Real F. Ransom, J. W. Slavin, signed their names as sureties.

[fol. 2] II

That, thereafter, J. H. P. Davis & Company and the surviving members of said firm, executed a general assignment under the laws of the State of Texas for the

benefit of creditors and appointed a trustee who qualified and acted as such until the second day of August, A. D. 1923, when said partnership firm and each of said members, to-wit: J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, were duly adjudicated bankrupt by the District Court of the United States for the Southern District of Texas; but that, theretofore, to-wit, in March, 1923, T. A. Wessendorff, a member of said partnership firm, had committed suicide.

III

That after making said assignment for the benefit of creditors T. B. Wessendorff, T. W. Davis, R. S. Dorst, A. P. George, Real F. Ransom and J. W. Slavin each paid the sum of Six Thousand ($6,000.00) Dollars, or a total of Thirty-six Thousand ($36,000.00) Dollars and that after said adjudication of bankruptcy made as aforesaid, said last named six sureties on said county depository bond for J. H. P. Davis & Company, paid on account of the loss sustained by said treasurer in consequence of the failure of said unincorporated bank, the sum of Twelve Thousand ($12,000.00) Dollars each, or a total of Seventy-two thousand ($72,000.00) Dollars, and that said respective payments were applied by said treasurer on account of and as a credit on One Hundred Eight Thousand ($108,000.00) Dollars upon the total loss of Three Hundred Thirty-four Thousand One Hundred Thirty-six and 24-100 ($334,136.24) Dollars, which was sustained by said county as a result of the failure of said bank as aforesaid.

[fol. 3] IV

That thereafter and notwithstanding said payments made by said sureties last named, the said C. Minkwitz, as treasurer of Fort Bend County, Texas, filed a claim on behalf of said County.

(a) Against the partnership estate of J. H. P. Davis & Company for the entire amount of the loss sustained by him as treasurer, as aforesaid, without giving credit for the payment received from said sureties, as aforesaid; and

(b) Against the individual estates in bankruptcy of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, for

the entire amount of the loss sustained by said treasurer as aforesaid, and without giving credit for the amount received from said sureties, as aforesaid.

V

That thereupon, petitioners herein filed their opposition and contest to the allowance of double proof and also in the alternative to the collection of the entire claim of said treasurer for the county without taking into account the payments made by said sureties, as aforesaid, and without taking into account the equitable principle of contribution governing the obligation of the sureties among themselves, as well as with their principal; and thereupon the Referee in Bankruptcy on, to-wit; the 5th day of December, A. D. 1924, overruled and denied the contest and opposition herein, and allowed said treasurer for and in behalf of Fort Bend County, to make double proof of said claim, that is, proof against the partnership estate of [fol. 4] J. H. P. Davis & Company and proof against the individual estates of the members of said partnership firm and giving priority to said claim over the claims of the general creditors insofar as it related to said individual estates of the members of said partnership firm.

VI

Thereafter, within the time required in such cases, petitioners filed a petition for review before the Honorable United States District Court for the Southern District of Texas, and that on the 1st day of December, A. D. 1925, allowance of the making of said double proof, as aforesaid, for the entire claim of C. Minkwitz, as treasurer of Fort Bend County, Texas, was allowed by said Honorable Court and the ruling and decision of the Referee in Bankruptcy was in all things and particulars sustained and affirmed.

VII

That petitioners herein feel themselves aggrieved by said ruling of the Referee in Bankruptcy, as well as of said United States District Court for the Southern District of Texas affirming the Referee's decision in allowing double proof, and say

(a) That the partnership members could not lawfully obligate themselves on a statutory depository's bond as surety for the partnership firm whereof they were members; and

(b) That, if mistaken as to this view, then that in any and all events the payment of the sum of One Hundred Eight Thousand ($108,000.00) Dollars having been made [fol. 5] by sureties on said bond who were not members of said partnership, to apply on the obligation created by the bond in question this payment could not be disregarded either in the allowance of the claim for the entire amount or on the question of equitable principle of contribution that each surety was, and should be, obligated in equal amount for the payment of the obligation of the principal in the bond; and feeling themselves aggrieved present this, their petition for review and file herewith their assignment of errors.

Therefore it is manifest the following questions of law on undisputed evidence arise in this case:

(1) Can the members of a partnership act and bind themselves as sureties on a statutory County Depository bond, given by the partnership as principal and signed by certain persons among whom were also members of the firm as sureties, to secure deposits in their unincorporated Bank.

(2) If they can not do this, then is the Court warranted in finding that while they signed as sureties these partners really intended to, and did, bind themselves as principals, nevertheless and notwithstanding that the written obligation evidences that they acted as sureties and the record is silent as to the intention of these parties as to whether they did, or did not, intend to bind themselves as sureties. This information was sought to be elicited, but on objection made by owner of the claim was excluded.

(3) If these partners did act as sureties, and could bind themselves as such, would all of the sureties, three of whom [fol. 6] are partners, and six of whom are not, be liable as among themselves for their proportionate part on the depository bond for the loss sustained,—so that when said six sureties who were not members of the partnership paid

on the obligation created by said bond the sum of $108,000.00, the equitable principle of contribution would apply and each would be liable for his pro rata part. If the pro rata share of each is to be taken into consideration and said six sureties have paid $108,000.00 could double proof be made for any amount not in excess of the proportionate obligation of the sureties so paying said sum of $108,000.00.

(4) Another question which arises is, can the obligee in the bond, who has received the sum of $108,000.00, from the sureties who were not partners of the firm, make double proof of its claim for the full amount of the loss sustained, (a) notwithstanding the credit to which the claim is entitled and (b) notwithstanding the loss is in excess of the liability on the bond.

The holding of the Court was made generally that the obligee in the bond could make double proof of the entire amount of his claim. The effect of this ruling was to give priority to the claimant insofar as the individual estates of the partners were concerned over the claims of the general creditors of the partnership. The facts on which the ruling of the Court was made were undisputed, and may be clearly and briefly stated as follows:

(a) J. H. P. Davis & Company, bankers, unincorporated, made a statutory bond as County Depository and signed the same as principal. The bond was signed by J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff, E. Foerster, T. B. Wessendorff, T. W. Davis, R. H. Darst, [fol. 7] A. P. George, Real F. Ransom and J. W. Slaven, as sureties. In the body of the bond J. H. P. Davis & Company were recited as principals and the other named individuals were recited as sureties, that part of the bond reading as follows:

"That we, J. H. P. Davis & Company, Bankers, Unincorporated, of Fort Bend County, Texas, as principal, and J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff, E. Foerster, T. B. Wessendorff, T. W. Davis, R. H. Darst, A. P. George, Real F. Ransom, and J. W. Slavin as sureties, are held and firmly bound unto C. D. Myers, County Judge of Fort Bend County, Texas, and to his successors in office in the penal sum of Three Hundred Thousand and no/100

($300,000.00) Dollars for the payment of which well and truly to be made in lawful money of the United States of America, we hereby bind ourselves, our heirs, executors and administrators firmly by these presents, both jointly and severally."

(b) J. H. P. Davis, R. E. L. Wessendorff, E. Foerster and T. A. Wessendorff constituted said partnership of J. H. P. Davis & Company, but T. A. Wessendorff died in March, 1923, before the assignment was made. T. B. Wessendorff, T. W. Davis, R. S. Darst, A. P. George, Real F. Ransom and J. W. Slavin paid $108,000.00. The loss sustained by the claimant on account of the failure of the bank was $334,136.24.

(c) The sureties making said payment were not members of the partnership.

(d) After said payment said claimant filed a claim for $334,136.24 against not only the partnership estate, but the individual estates of each of the three remaining surviving [fols. 8 & 9] partners, whose estates were also in bankruptcy. Double proof was allowed by the Referee and this was affirmed by the District Court in Bankruptcy. The record is silent as to how the partners intended to bind themselves when they signed the bond as sureties, but it was recited in the bond that they were acting as sureties. None of the facts are disputed.

Wherefore, your petitioners pray that said decree of the United States District Court for the Southern District of Texas, Galveston Division, be reviewed by this Most Honorable Court, and that citation or notice issue pursuant to law, and that the decree of the Honorable District Court for the Southern District of Texas affirming the ruling of the Referee in Bankruptcy be reversed and that your petitioners be granted such other and further relief as to this Honorable Court may seem just and proper.

Lewis R. Bryan and E. B. Colgin, of Bryan, Dyess, Colgin & Suhr, Attorneys for Trustees and I. R. Bryan and Other Creditors. I. R. Bryan, George Hamman, T. J. Hannock.

Duly sworn to by I. R. Bryan et al. Jurat omitted in printing.

[fol. 10] The petition to revise in matter of law is allowed upon the petitioners depositing in cash the sum of $250.00, or filing a bond in said sum of $250.00, with sufficient sureties to be conditioned as required by law to be approved by the Clerk.

This the 4th day of December, A. D. 1925.

J. H. Hutcheson, Jr.

[fol. 11] In United States Circuit Court of Appeals

Claim of C. Minkwitz, Treasurer

[Title omitted]

Assignments of Error

Now in the above styled matter and cause come J. W. Hampel, George Hamman and J. T. Holbrook, as trustees for J. H. P. Davis & Company, bankrupt, and also come I. W. Bryan, and other creditors, and file in connection with their petition for review in this case the following assignment of errors:

I

That the Honorable District Court of the United States for the Southern District of Texas, erred in affirming the ruling and decision of the Referee, J. W. Lockhart, in allowing double proof to be made in said estate.

II

That the Honorable District Court of the United States for the Southern District of Texas erred in holding that proof could be made in favor of C. Minkwitz, as treasurer of Fort Bend County, Texas, against the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, who were members of the bankrupt partnership of J. H. P. Davis & Company, and also co-sureties on the statutory bond signed by said bankrupt as principal, and in holding that said claim should have priority over the claims of the general creditors of the estate of J. H. P. Davis.

[fol. 12]

III

That the Honorable District Court of the United States for the Southern District of Texas erred in affirming the decision of the referee, J. W. Lockhart, of Galveston, Texas, and in holding that Fort Bend County was entitled to priority in having its claim paid out of the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, before any other claims of the general creditors could be satisfied out of said individual estates; and especially was this holding erroneous in view of the undisputed fact that the bond given by said J. H. P. Davis & Company was signed as sureties by J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, who were members of said partnership firm, as well as by other sureties not members of said partnership firm.

IV

That the Honorable District Court of the United States for the Southern District of Texas erred in holding that nevertheless and notwithstanding the fact that Fort Bend County had already been paid, and had, therefore, received from six of the sureties who were not members of said partnership firm of J. H. P. Davis & Company the sum of $108,000.00, it could file and be allowed its entire claim against the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, without giving said claim the credit entitled by reason of said payment.

V

That the Honorable District Court of the United States for the Southern District of Texas erred in holding that nevertheless and notwithstanding the fact that the bond [fol. 13] which was signed by J. H. P. Davis and Company as principal and as sureties by J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, who were members of said partnership and other sureties not members of said firm, obligated the sureties to the obligee for the sum of only $300,000.00, said obligee could nevertheless file and be allowed its entire claim of $334,136.24, which was in excess of said liability created by and under said bond.

VI

The Honorable District Court of the United States for the Southern District of Texas erred in holding in effect that the equitable doctrine of contribution did not apply as to the sureties on the bond in question, and that, therefore, Fort Bend County could rightfully file and be allowed its entire claim against the individual estates of the members of J. H. P. Davis & Company, and thus and thereby give and allow to the sureties who were not members of said partnership firm and who have paid Fort Bend County said sum of $108,000 preference and priority over the general creditors of the partnership firm; whereas the Court should have held that each surety was liable for his proportionate share, and that the sureties who made the payment of $108,000.00 could only be allowed, whether directly or indirectly, only such sum or amount as was in ex-ess of their proportionate part of the obligation under the bond.

VII

The Honorable District Court of the United States for the Southern District of Texas erred in holding in effect that the partners of J. H. P. Davis & Company, who signed the statutory bond in question, signed the same as individuals although it was plainly recited in the bond as well [fol. 14] as after their signatures that they had signed the same as sureties for their principal, J. H. P. Davis & Company.

VIII

That the Honorable District Court of the United States for the Southern District of Texas erred in not holding in effect that C. C. Minkwitz, as treasurer of Fort Bend County (if at all) could only file his claim against the individual estates of the partners of J. H. P. Davis & Company for such amounts only as represented the proportionate obligation of J. H. P. Davis, R. E. L. Wessendorff and E. Feerster on the bond in question.

Lewis R. Bryan and E. B. Colgin, of Bryan, Dyess, Colgin & Suhr, Attorneys for J. W. Hampel et al.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

In Bankruptcy. No. 1527

In the Matter of J. H. P. DAVIS AND COMPANY et al., Bankrupt

STIPULATION RE TRANSCRIPT OF RECORD

Whereas, in the above styled and numbered cause J. W. Hampel, Geo. Hammon and J. T. Holbrook, as trustees for J. H. P. Davis & Company, Bankrupt, and I. R. Bryan and other creditors have filed in the United States Circuit Court of Appeals for the Fifth Circuit a petition to Superintend and Revise the decree of the District Court in this case, [fol. 15] decreeing and holding that C. Minkwitz, as treasurer of Fort Bend County, Texas, was entitled to recover on his claim the sum of Three Hundred and Thirty Four Thousand One Hundred and Thirty Six and 24/100 ($334,136.24) Dollars, against both J. H. P. Davis & Company, Bankrupt, and the separate estates of the individual members composing said firm of J. H. P. Davis & Company; and

Whereas, in addition to the filing of said petition to Superintend and Revise the said trustees and said creditors have also taken an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from said decree of the District Court, as aforesaid, and have prepared a transcript containing all of the papers and documents which form the record in this case and constitute the transcript of appeal.

Now in order to avoid costs of duplicating the record it is hereby stipulated and agreed that all that portion of the record filed in connection with said appeal which may be pertinent to said petition to Superintend and Revise shall be considered as a part of the record and as a part of the transcript of said petition to Superintend and Revise without the necessity of the petitioners filing two copies of the same portions of the record, just as if, and to the same extent as if said documents and papers were actually filed as a part of said transcript of the petition to Superintend and Revise.

It is hereby agreed further that the printed record in the matter of the appeal, as aforesaid, shall be used so far as same is pertinent as a part of the printed record of the transcript of the action to superintend and revise and that it will not be required to have two printed records of said [fols. 16 & 17] proceedings, and all objections regarding the use of the single printed record in the two matters are waived.

It is further understood that the stipulations herein entered into by the trustees and creditors and claimants have reference only to the saving of unnecessary cost to the parties taking out their appeal and filing the petition to Superintend and Revise in the preparation and printing of two records, and are not intended to constitute and does not constitute a waiver of the right to raise any and all objections, except to the printing and filing of one instead of two records.

Bryan, Dyess, Colgin & Suhr, Attorneys for Petitioners, J. W. Hampel, et al. Foster & Williams and Vinson, Elkins, Sweeton & Weems, Attorneys for C. Minkwitz, Treasurer of Fort Bend County, Texas. Foster & Williams, Attorneys for T. B. Wessendorff et al. Vinson, Elkins, Sweeton & Weems, Attorneys for A. P. George et al.

NOTE RE WAIVER OF CITATION

Waiver of Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed January 29, 1926

Hon. L. C. Masterson, United States District Clerk, Southern District of Texas, Houston, Texas.

DEAR JUDGE MASTERSON: This is a præcipe for you to include the following papers in the transcript on appeal of

the above styled cause in reference to the allowance of double proof being allowed by the District Court as shown by his decree rendered on the first day of December, 1925.

1. Amended claim of County of Fort Bend, filed by C. Minkwitz, County Treasurer.

1-a. Agreement as to date original claim of Minkwitz was filed.

[fol. 19] 2. Contest by J. W. Hampel, et al.

2-a. Contest by I. R. Bryan.

3. Supplemental contest of Trustees.

4. Agreement as to bond, etc.

4-a. Agreement as to payments, etc.

5. Proof of claim of J. W. Slaven.

5-a. Agreement as to proof of individual claims and contest.

6. Findings of Referee.

7. Referee's certificate.

8. Proceedings before Referee.

9. Decree of Referee.

10. Petition for review.

10-a. Decree of Judge Hutcheson.

11. Petition and order for appeal.

12. Appeal Bond.

13. Assignment of errors.

14. Include opinion of Court, if this is proper or usually done.

[fol. 20] We will kindly thank you to insert these papers in the transcript in the order in which they have been mentioned.

Yours very truly, Bryan, Dyess, Colgin & Suhr.

[Caption omitted]

[fol. 21] In United States District Court

Amended Claim of County of Fort Bend—Filed September 18, 1924, Before Referee

[Title omitted]

At Richmond in said Southern District of Texas on the 10th day of December, A. D. 1923, came C. Minkwitz of

Richmond, in the county of Fort Bend, State of Texas and with leave of the Court first being had and obtained, files this the amended claim of the County of Fort Bend, State of Texas, and makes oath and says:

That he is Treasurer of Fort Bend County, a political subdivision of the State of Texas, being a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Texas, with its county seat and principal place of business at Richmond in said county, and that he is duly authorized to make this proof.

Affiant further says:

First. That the said J. H. P. Davis & Company, and the said J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, as survivors of the co-partnership of J. H. P. Davis & Company and J. H. P. Davis, R. E. L. Wessendorff and E. Foerster individually, against all of whom petition for adjudication in bankruptcy has been filed, were at and before the filing of said petition, and still [fol. 22] are justly and truly indebted unto the said C. Minkwitz, as Treasurer of said Fort Bend County, in the sum of Three Hundred thirty-four Thousand One Hundred Thirty-six and 24/100 Dollars ($334,136.24) together with interest thereon from the 21st day of March, 1923, at the rate of six (6%) per cent per annum.

Second. That the consideration of said debt is as follows:

That heretofore to-wit, on February 14, 1921, said J. H. P. Davis & Co. were, in accordance with the laws of the State of Texas, directing authorizing and regulating the appointment of county depositories, duly appointed county depository for said Fort Bend County, upon their bid and agreement to pay interest upon the moneys deposited with them as such county depository, in accordance with the laws of the State of Texas, at the rate of six (6%) per cent per annum, monthly on daily balances and duly accepted said appointment and qualified thereunder by giving bond as required by the laws of the State of Texas; and that thereafter continuously to and until the 21st day of March, 1923, there were deposited with said J. H. P. Davis & Co., as such county depository money and funds required by the law

to be deposited with such depository, such deposits being made from time to time during said period, during which period also, various and sundry sums were withdrawn from and paid out by said depository for and on account of said Fort Bend County, and various funds belonging to said county, included in such deposits; that said funds belonging to said county were carried on the books of accounts kept by said county depository, said J. H. P. Davis & Co., in different accounts, to-wit: one account in the name of C. [fol. 23] Minkwitz, County Treasurer, another account in the name of Fort Bend County Availables, (meaning Fort Bend County available school funds); another account in the name of W. W. Ward, Tax Collector (the said W. W. Ward being Tax Collector of Fort Bend County) another account in the name of W. W. Ward, State Fund; and another account the exact style of which affiant is not now able to state, but which covered permanent school funds of Fort Bend County; and this affidavit and proof applies to and covers only, moneys carried in the first two accounts named, to-wit: in the name of C. Minkwitz, County Treasurer, and in the name of Fort Bend County Availables, the indebtedness of said bankrupts on the other accounts above named not being included in this affidavit and proof, but to be proved and presented separately; and that from time to time and at the end of each calendar month, during the period above named, the said J. H. P. Davis & Co. rendered accounts showing balances due on said accounts, including the interest thereon credited, in accordance with their bid and agreement and their appointment as county depository, which amounts, so rendered, were from time to time, examined, checked, approved, accepted by the said Fort Bend County, and thereupon became and were stated accounts; that on or about the 1st day of March, 1923, the said J. H. P. Davis & Co., so rendered a statement of account in the name C. Minkwitz, County Treasurer, showing a balance due by said bankrupt at the end of February, 1923, in the sum of Two Hundred and Two Thousand Seven Hundred Seventy-six and 73/100 dollars ($202,776.73) which amount so rendered, having been fully examined, checked and approved by said C. Minkwitz, County Treasurer, and the Commissioner's Court of Fort Bend County, was accepted by them as true and correct, and thereupon became and

[fol. 24] was and is a stated account, showing an indebtedness of said bankrupts on said date in the said amount of $202,776.73; said account, so rendered and accepted and so made a stated account, is hereto attached, marked Exhibit A, now referred to and made a part hereof, to all intents and purposes and with like effect as if fully and in detail set out; and thereafter at various dates during the month of March, 1923, to and including the 21st day of said month, additional deposits were made with the said bankrupts on said account and withdrawals paid therefrom from time to time, as fully and in detail set out in a statement hereto attached and marked Exhibit B and now referred to and made a part hereof to all intents and purposes and with like effect as if fully and in detail set out, leaving a balance due by and from said bankrupts on said March 21, 1923, on said account in the sum of Two Hundred Eighty-six Thousand Six Hundred Eighty-one and 87/100 dollars ($286,-681.87) since which time no further deposits have been made in said account, nor withdrawals paid therefrom. The bankrupts, however, are entitled to a credit on said amount of the sum of $504.83 which credits are represented by warrants of Fort Bend County belonging to said bankrupts in the possession of and belonging to the said bankrupts, aggregating $404.84 and an item of $5.30 which was expended by said bankrupts as a cost of various telegrams sent by it at the instance of Fort Bend County, in reference to the county bonds of said county; and $100.00 of said amount is represented by a school warrant issued by the trustees of the Missouri City Common School District of Ft. Bend County to Mrs. McGar, said warrant having been purchased by said bankrupts. After allowing said credits, there is a balance due on said account in the name of C. [fol. 25] Minkwitz, County Treasurer, in the sum of $286,-177.03. That on or about the 1st day of March, 1923, said J. H. P. Davis & Co. made and rendered an account of moneys in the name of Fort Bend County, Availables, showing a balance on February 28, 1923, due and owing from said said J. H. P. Davis — Co. on said account in the sum of Twenty-nine Thousand Five Hundred Eighty-five and 72/100 ($29,585.72) dollars, which account having been duly acquiesced in, accepted and approved became and was and is now a stated account showing an indebtedness of

said J. H. P. Davis & Co. on said account on said February 28, 1923, in the sum of $29,585.72; copy of said stated account marked Exhibit C is hereto attached now referred to and made a part hereof, to all intents and purposes and with like effect as if fully and in detail herein set out; that, thereafter at various dates during the month of March, 1923, to and including the 21st day of said month, additional deposits were made with and paid to said depository and withdrawals paid by them on said account as in detail set out in Exhibit D hereto attached, now referred to and made a part hereof, to all intents and purposes and with like effect as if fully and in detail herein set out, showing a balance due from said depository for funds deposited on the account styled Fort Bend County, Availables on March 21, 1923, in the sum of Forty-nine Thousand Two Hundred Twenty-three and 83/100 dollars ($49,223.83) since which date, March 21, 1923, no further deposits in or withdrawals from said account have been made; but said account is entitled to a credit of $1,267.50 for vouchers theretofore paid, and a charge of $2.88 a/c of error, leaving actual net balance due by bankrupt $74,959.21; and that said bankrupts, J. H. P. Davis & Co. are now indebted to the said Fort Bend County, as hereinbefore set out, in the sum of Two Hundred Eighty-six thousand, one hundred seventy-
[fol. 26] seven and 03/100 dollars ($286,177.03) on the account in the name of C. Minkwitz; and in the sum of forty-seven thousand nine hundred fifty-nine and 21/100 dollars ($47,959.21) on the account in the name of Fort Bend County, Availables (aggregating the sum of $334,136.24) together with six (6%) per cent interest thereon from March 21, 1923.

Third. That the amounts above mentioned were represented by deposits made by the County of Fort Bend under and by virtue of the laws of the State of Texas, and depository bonds, as required by law were taken from the said bankrupts the said bonds being signed by J. H. P. Davis & Co., J. H. P. Davis, R. E. L. Wessendorff, T. A. Wessendorff and E. Foerster, all of whom at the time of the signing of said bonds were members of the co-partnership of J. H. P. Davis & Co., the said bonds being signed in addition by T. W. Davis, A. P. George, Real Ransom, R. H.

Darst, J. W. Slaven and T. B. Wessendorff; a copy of the bonds are hereto attached marked "Exhibit 1" and Exhibit "2" for identification; that by reason of the said depository bonds aforesaid and by reason of the said J. H. P. Davis, R. E. L. Wessendorff and E. Foerster signing their names thereto, not only the co-partnership of J. H. P. Davis & Co. became liable and bound to pay the said Fort Bend County the amounts due under said deposits made as aforesaid, but the persons whose names are hereinbefore mentioned also became bound and liable and are now bound and liable to pay said County the amounts of money due said county at the time of the closing of said bank; that the said bonds aforesaid were in full force and effect at the time of the closing the doors of said bank.

Fourth. That if claimant be mistaken in alleging that said bonds were statutory bonds and taken in compliance [fol. 27] with the laws of the State of Texas, yet claimant notwithstanding, alleges that the persons hereinbefore named did execute to claimant the bonds, copies of which are hereto attached and made a part hereof, promising and agreeing to pay interest on said money so deposited and at the expiration of the term for which it was chosen to turn over to claimants all the bonus, property and other things of value coming into their hands as such depository; and that thereby they promised, agreed and bound themselves to account to claimant herein, for the moneys so deposited and to repay the same; that the said moneys hereinabove mentioned were deposited; that they were not turned over to claimant; that the persons hereinbefore named, against whom this claim is made, have been adjudged bankrupts; and all and each of them are personally liable to claimant herein for the full sums on deposit at the time of the closing of the doors of said bank.

Fifth. That the co-partnership firm of J. H. P. Davis & Company and its surviving members, to-wit J. H. P. Davis, R. E. L. Wessendorff and E. Foerster having heretofore in this proceeding been adjudged bankrupts and this claim is made not only against the banking firm of J. H. P. Davis & Company, but is made against the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster the

said three surviving members of the co-partnership being liable to claimant herein not only as members of the co-partnership firm of J. H. P. Davis & Company, but are individually liable on account of having signed the bonds hereto attached and made a part hereof as individuals, whereby, under and by virtue of the bonds aforesaid, they became individually liable for the payment of said money so deposited with the banking firm of J. H. P. Davis & Co. [fol. 28] and claimant herein has an individual claim against the individual assets of said surviving members as hereinbefore mentioned.

Sixth. That no part of said indebtedness, either of principal or interest, due on said accounts has been paid, and there are no offsets or counterclaims to the same; that said Fort Bend County has not nor has any person by its order, nor to the knowledge or belief of deponent, for its use had or received any manner of security for said debt whatsoever.

C. Minkwitz, Treasurer Fort Bend County, Texas, Claimant.

Subscribed and sworn to before me, the undersigned authority, by C. Minkwitz, Treasurer of Fort Bend County, Texas, on this the 9th day of Sept., A. D. 1924. Elouise Minkwitz, Notary Public in and for Fort Bend County, Texas. (Seal.)

Exhibit One to Amended Claim

In re Depository Bond of J. H. P. Davis & Company for County Funds

The State of Texas,
County of Fort Bend:

Know all men by these presents:

That we, J. H. P. Davis & Company, Bankers, unincorporated of Fort Bend County, Texas, as principal and J, H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff, [fol. 29] E. Foerster, T. B. Wessendorff, T. W. Davis, R. H. Darst, A. P. George, Real F. Ranson and J. W. Slavin

as sureties, are held and firmly bound unto C. D. Myers, County Judge of Fort Bend County, Texas, and to his successors in office, in the final sum of Three Hundred Thousand & No/100 ($300,000.00) Dollars, for the payment of which well and truly to be made in lawful money of the United States of America, we hereby bind ourselves, our heirs, executors and administrators firmly by these presents, both jointly and severally.

Signed with our hands sealed and dated this — day of February, A. D. 1921.

The conditions of the foregoing obligation are such that whereas the above bounden principal J. H. P. Davis & Co., Bankers unincorporated, was on the 15th day of February, A. D. 1921, duly and legally chosen by the Commissioners Court of Fort Bend County, Texas, as County Depository for said County, for a period of two years, ending sixty (60) days after the time fixed by law for the next selection of a depository, upon its bidding and agreeing to pay to the County of Fort Bend, interest on daily balances debt in said Depository of said County of Fort Bend, at the rate of (6%) per cent per annum, said interest payable monthly.

Now, therefore, if the above bounden principal J. H. P. Davis & Co. Bankers unincorporated, shall faithfully do and perform all the duties and obligations devolving on it by law as the County Depository of Fort Bend County, and shall, upon presentation pay checks drawn on it by the County Treasurer of Fort Bend County, Texas, shall faithfully keep and account for all funds belonging to the county [fol. 30] which are deposited with it, and all other funds deposited with it under the requirements of Chapter II Acts of the Thirty-fifth Legislature passed at its Regular Session, and shall pay the interest at the time and at the rate hereinabove stipulated; and shall at the expiration of the term for which it has been chosen, turn over to its successor all the funds, property and other things of value coming into its hands as such depository, then and in that event this obligation is to become null and void, otherwise to remain in full force and effect.

Any suits arising out of or in any way connected with this bond shall be tried in the County of Fort Bend and State of Texas, in any Court therein having jurisdiction of the subject matter.

In witness of all of which we have hereunto set our hands and the said J. H. P. Davis & Co. Bankers Unincorporated, has caused these presents to be signed with its name and by its president and attested and sealed with its corporate seal the day and year first above written.

J. H. P. Davis & Co., by J. H. P. Davis, President, as Principal. E. Foerster, R. E. L. Wessendorff, J. H. P. Davis, T. A. Wessendorff, T. B. Wessendorff, T. W. Davis, R. H. Darst, A. P. George, Real F. Ransom, J. W. Slavin, as Sureties.

[fol. 31] **Acknowledgment**

THE STATE OF TEXAS,
County of Fort Bend:

Before me, E. M. Mayfield, a Notary Public in and for Fort Bend County, Texas, on this day personally appeared J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff; E. Foerster, T. B. Wessendorff, T. W. Davis, R. H. Darst, A. P. George, Real F. Ransom, J. W. Slavin, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 19th day of February, A. D. 1921.

E. M. Mayfield. (L. S.)

NOTE 1.—This bond must be signed by not less than five solvent sureties, who shall own unincumbered real estate in this State not exempt from execution and of such value as the amount of said bond; provided, that the bond may be made by a surety company, and, provided further, that the Commissioners' Court may accept, in lieu of such real estate or surety company, security, bonds of the United States or of the State of Texas or of any county city, town or independent school district of this State.

NOTE 2.—The amount of the bond of the County Depository shall be in an amount not less than the total revenue of the County or State, county and district purposes, excluding the common school districts for the year next preceding the making of the bond.

[fol. 32] NOTE 3.—The County Depository shall execute another bond, with not less than two solvent sureties, in an amount equal to the probable amount of the available school funds and of the permanent school fund of the county.

Approved in open Commissioners' Court, Feburary 25, 1921.

C. D. Myers, County Judge, Fort Bend County.

EXHIBIT TWO TO AMENDED CLAIM

In re Depository Bond of J. H. P. DAVIS & COMPANY for School Funds

Bond of County Depository to Cover School Funds

(Original to be filed with the County Clerk and certified copy or copy bearing original signatures mailed to State Department of Education, Austin, Texas.)

THE STATE OF TEXAS,
County of Fort Bend:

Know all men by these presents:

That we, J. H. P. Davis & Co., Unincorporated Bankers of Richmond, Texas, as Principal and J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff, E. Foerster, T. B. Wessendorff, T. W. Davis, R. H. Darst, A. P. George, Real F. Ransom and J. W. Slavin as Sureties, are held and firmly bound unto C. D. Myers, County Judge of Fort Bend County, Texas, and his successors in office, in the sum of Fifty Thousand & No/100 Dollars for the payment of which we hereby bind ourselves and our heirs, executors and administrators, jointly and severally by these presents.

[fol. 33] The condition of the above obligation is such that, whereas the above bounden J. H. P. Davis & Co., Unincorporated Bankers, offered the highest bid of interest on daily balances (6%) and was, on February 14, 1921, chosen by the Commissioners' Court as depository of the funds of Fort Bend County, including the school funds, for the term of two years, beginning February 14, 1921.

Now therefore, if the said J. H. P. Davis & Co., Unincorporated Bankers (shall safely keep and faithfully disburse the school funds according to law and pay such warranty as may be drawn on said funds by competent authority) and shall account for them together with interest thereon at the rate of 6% per annum, calculated on daily balances in the Commissioners' Court of said County and to the State Superintendent of Public Instruction as required by law, then this obligation shall be void; but otherwise it shall remain in full force and effect.

In testimony whereof, witness our hand- this February 19, 1921.

J. H. P. Davis & Co., by J. H. P. Davis, Principal.
J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff, E. Foerster, T. B. Wessendorff, T. W. Davis, R. H. Darst, A. P. George, Real F. Ransom, J. W. Slavin, Sureties.

[fol. 34] Approved in open Commissioners' Court, this 25" day of February, 1921.

C. D. Myers, County Judge.

(NOTE.—This bond must be in a sum equal to the amount of the County Permanent School Fund plus the probable amount of the Available School Fund.)

IN UNITED STATES DISTRICT COURT

No. 1527. In Bankruptcy

In re Claim of C. C. MINKWITZ

AGREEMENT AS TO DATE OF ORIGINAL CLAIM OF MINKWITZ—Filed December 29, 1925

It is agreed that the original claim of C. C. Minkwitz which is amended by the claim above set out, was filed on August 22, 1923, and the said claim and its file mark are omitted herefrom to prevent encumbering this record on appeal.

Foster & Williams, Vinson, Elkin, Sweeton & Weems, Attorneys for Claimants. Bryan, Dyess, Colgin & Suhr, Attorneys for Contestants.

[fol. 35] IN UNITED STATES DISTRICT COURT

CONTEST BY J. W. HAMPEL ET AL. OF THE CLAIM OF FORT BEND COUNTY—Filed with Referee March 8, 1924, at 11:23 A. M.

Now comes J. W. Hampel, George Hamman and T. J. Holbrook as trustees, for J. H. P. Davis & Company, bankruptcy and enter their protest herein against and contest the claims of Fort Bend County, filed in the name of C. Minkwitz, Treasurer, and W. W. Ward, Tax Collector, in so far as there is any attempt on the part of said claimant to assert or claim or set up that there is any difference or distinction between the estate of J. H. P. Davis & Company as a partnership and the individual estates of the bankrupts, J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, for the purpose of allowing the claims of said Fort Bend County as against said separate estate of said partners, namely, J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, either or all of them, on the ground that there was any separate, distinct or other liability on the part of said partners, individually that was different or separate from their liability as members of the firm of J. H. P. Davis & Company.

Your contestants, the trustees herein, would respectfully show as their reason for making this contest that they understand and are advised that the said J. H. P. Davis & Company gave to Fort Bend County a bond under the depository law of the State of Texas, being Revised Statutes Articles 2440 to 2453, inclusive, and especially Article 2443 of the Revised Statutes of Texas as amended in 1917, and which prescribes the character of depository bond or security which should be given by a banker, whether a cor-[fol. 36] poration, association or individual banker; that a true copy of said bond is hereto attached, marked Exhibit A, and made a part of this contest and protest; that your contestants are advised that the six sureties signing said bond, namely T. B. Wessendorff, A. P. George, T. W. Davis, Real F. Ransom, R. H. Darst and J. W. Slavin, are claiming that the said partners, J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, who composed the partnership of J. H. P. Davis & Company as to their individual assets are separately liable to Fort Bend County, so that as a result

thereof Fort Bend County is an individual creditor of said partners and entitled by reason thereof to have a priority of payment out of the separate estate of each and all of said partners J. H. P. Davis, R. E. L. Wessendorff, and E. Foerster before and prior to the claim of any general creditor of J. H. P. Davis & Company, the partnership. These contestants submit and contend that the said individual partners, J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, who have also been individually adjudged bankrupts, at the time that they signed said bond, did so as members of the partnership of J. H. P. Davis & Company and were not and could not become sureties for themselves, who composed the partnership of J. H. P. Davis & Company and therefore, while said individual partners as members of said partnership became jointly and severally liable by reason of the signing of said bond by J. H. P. Davis & Company, the partnership that it did not have the effect of making the County a creditor of the individual assets of said partners except after the exhaustion of the partnership, and then the County would be only a general creditor of said individual partners and of their respective assets now being administered in bankruptcy. That the contention and the understanding of the trustees, the con- [fol. 37] testants herein, is that under the facts and the law the said Fort Bend County, through its Treasurer and its Collector, can only be a general creditor in the same sense that every other creditor and every depositor in the bank of J. H. P. Davis & Company is a creditor and not a preferred creditor as to the separate estates of said individual partners, and your trustees are now making this contest and this protest in order that no order may be entered which can in any manner prejudice each and all of the general creditors of J. H. P. Davis & Company, bankrupts, to have their respective claims paid pro rata out of the separate estates of the said partners without any distinction in favor of the said Fort Bend County or the sureties on said bond. Your contestants further state that their understanding is and they so charge the fact to be that the said sureties T. B. Wessendorff, A. P. George, J. W. Slavin, T. W. Davis, R. F. Ransom and R. H. Darst, have paid to Fort Bend County approximately $144,000.00 by

reason of the breach of said bond, and that therefore Fort Bend County, through its said Treasurer and Collector, should not be allowed the full amount of its claim for to the extent of said payment of $144,000.00 the claim of Fort Bend County has been satisfied and should be credited with that amount.

Your contestants, trustees herein, respectfully show to the Court, that if they are mistaken in their belief and assertion herein that the said partners J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, could not become sureties for themselves by signing said bond or attempting to sign the same as sureties for the firm of J. H. P. Davis & Company that if it should be held that the said individual partners were sureties on said bond and therefore co-sureties with the said T. B. Wessendorff, A. P. George, T. W. Davis, Real F. Ransom, R. H. Dart and J. W. Slavin that [fol. 38] then and in that event there would be a right of contribution whereby each one of the sureties should pay his pro rate part of said bond and that the separate estates of said partners would only be liable for their pro rata part of said indebtedness due the County by virtue of the execution of said bond; and your contestants, trustees of said J. H. P. Davis & Company, a partnership, submit that if the separate estates of said partners should pay to Fort Bend County through its said Treasurer, C. Minkwitz and its said Collector W. W. Ward, more than the pro rata due by each of said partners as sureties upon said bond that then in that event the trustees of said J. H. P. Davis & Company should be subrogated to the extent of such excess payment made by the separate estate of each of said partners and would be entitled to collect the same from said separate estate of each of said partners so that the ten sureties upon said bond should only contribute each his pro rata part thereof.

Wherefore, premises considered, your trustees respectfully pray the Court to disallow and disprove the claim of Fort Bend County to the extent of said $144,000.00 more or less, paid by said sureties, and that the claim of said Fort Bend County through its said Treasurer and said Collector be allowed as general creditors, with no greater

right as against the separate estate of each of said partners than is allowed to all the other creditors and depositors in said J. H. P. Davis & Company, bankrupt.

Respectfully submitted.

C. H. Chernosky, Bryan, Dyess & Colgin, Attorneys for Trustees, Hampel, Hamman & Holbrook.

[fol. 39] Exhibit "A" to Contest of J. W. Hampel et als.

(Copy)

The State of Texas,
County of Fort Bend:

Know all men by these presents:

That we J. H. P. Davis & Company, Bankers, Unincorporated, of Fort Bend County, Texas, as Principal and J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff, E. Foerster, T. B. Wessendorff, T. W. Davis, R. H. Darst, A. P. George, Real F. Ransom and J. W. Slavin as sureties, are held and firmly bound unto C. D. Myers, County Judge, of Forth Bend County, Texas, and to his successors in office in the penal sum of Three Hundred Thousand & no/100 ($300,000.00) Dollars, for the payment of which well and truly to be made in lawful money of the United States of America, we hereby bind ourselves our heirs executors and administrators firmly by these presents, both jointly and severally.

Signed with our hands, sealed and dated this — day of February, A. D. 1921.

The condition of the foregoing obligation are such that whereas the above bounded principal J. H. P. Davis & Co., Bankers, Unincorporated, was on the 15th day of February, A. D. 1921, duly and legally chosen by the Commissioners Court of Fort Bend County, Texas, as County Depository of said County, for a period of two years, ending sixty (60) days after the time fixed by law for the next selection of a depository, upon its bidding and agreeing to pay to the County of Fort Bend interest on daily balances in debt in said depository of said County of Fort [fol. 40] Bend, at the rate of (6%) six per cent per annum, said interest payable monthly.

Now, therefore, if the above bounded principal, J. H. P. Davis & Co., Bankers, Unincorporated, shall faithfully perform all the duties and obligations devolving on it by law as the County Depository of Fort Bend County, and shall upon presentation pay checks drawn on it by the County Treasurer of Fort Bend County, Texas, shall faithfully keep and account for all funds belonging to the County which are with it and all other funds deposited with it under requirements of Chapter 11, Acts of the Thirty Fifth Legislature passed at its regular session, and shall pay the interest at the time, and at the rate herein before stipulated; and shall at the expiration of the term for which it has been chosen turn over to its successor all the funds, property and other things of value coming into its hands as such depository, then and in that event this obligation is to become null and void, otherwise to remain in full force and effect.

Any suits arising out of or in any way connected with this bond, shall be tried in the County of Fort Bend and State of Texas, in any Court herein having jurisdiction of the subject matter thereof.

In witness of all of which we have hereunto set out [our] hands and the said J. H. P. Davis & Co., Bankers, Unincorporated, has caused these presents to be signed with its name by its President and attested and sealed with its corporate seal the day and year first above written.

J. H. P. Davis & Co., by J. H. P. Davis, President, as Principal.

[fol. 41] (Acknowledged:) J. H. P. Davis, T. A. Wessendorff, R. E. L. Fessendorff, E. Foerster, T. B. Wessendorff, T. W. Davis, R. H. Darst, A. P. George, Real F. Ransom, J. W. Slavin, as Sureties.

IN UNITED STATES DISTRICT COURT

CONTEST OF I. R. BRYAN OF THE CLAIM OF FORT BEND COUNTY—Filed with Referee February 23, 1924, at 11 A. M.

To the Hon. Judge of said Court:

Now comes I. R. Bryan, one of the creditors of J. H. P. Davis & Company, Bankrupts, in Bankruptcy and enters

his protest herein, and demurs generally to the claim of Fort Bend County, jointly against the partnership assets of the said J. H. P. Davis & Company, and against the individual assets and properties of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, three of the co-partners of the said J. H. P. Davis and Company arising by virtue of the breach of the terms and covenants of the County Depository Bond for $300,000.00 dated February — A. D 1921, and say to the Court that the same is insufficient as presented and should be disapproved, disallowed, refused and dismissed and of this he prays judgment of the Court.

[fol. 42] 2

Without waiving his foregoing demurrer, but expressly reserving the same, your creditor I. R. Bryan, further protests and contests the said claim of Fort Bend County against the said partnership assets of J. H. P. Davis & Company and against the individual assets of the co-partners and represents to the Court that said claim should not be allowed as against the individual assets and properties of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster for the following good and sufficient reason, to-wit: Because the said County Depository Bond is a statutory bond authorized by virtue and under article 2443 of the Revised Civil Statutes of the State of Texas, and that it is not, and was not, contemplated by said article that the members of the said co-partnership or any co-partnership or of any one of such members of such co-partnership should sign such a bond as sureties, for the reason that when said bond in question was signed by the firm name of J. H. P. Davis & Company the firm signature bound not only the said co-partnership but each individual partner and all the partnership as well as the individual properties were liable for the payment of the partnership debts and therefore the individual signatures of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster should be treated as principals and not as sureties and for the further reason that said bond had at least five solvent sureties other than those composed of the said co-partnership.

3

Your creditor further represents to the Court that if the Court should hold that the individual signatures of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster on [fol. 43] said bond are treated as sureties that then and in that event your creditor says that said other sureties appearing on said bond to-wit: T. B. Wessendorff, A. P. George, J. W. Slavin, T. W. Davis, R. F. Ransom, R. H. Darst, have paid approximately $144,000.00 to the county of Fort Bend by reason of said breach in said bond and that therefore Fort Bend County should not present the claim for the full amount and that to that extent said claim of Fort Bend County is unauthorized and should not be allowed.

4

For further answer herein your creditor respectfully represents to the Court that if the Court should hold that J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff and E. Foerster comprising said firm each individually are sureties that then the doctrine of contribution should apply as between the sureties T. E. Wessendorff, A. P. George, T. W. Davis, Real F. Ransom, R. H. Darst and J. W. Slavin and that six-tenths of the claim as against the individual estates of J. H. P. Davis, R. E. L. Wessendorff, E. Foerster and the estate of T. A. Wessendorff should be paid by T. B. Wessendorff, A. P. George, T. W. Davis, estate R. H. Darst, Real F. Ransom and J. W. Slavin and should not be paid out of the individual estates of the members of the co-partnership and that the said six sureties other than those composing the partnership should be classed as common creditors as against the co-partnership and may file their claims against the co-partnership if they so desire.

Wherefore, premises considered, your creditor respectfully prays the Court to refuse, disallow and disapprove the claim of Fort Bend County against the individual estates of [fol. 44] the said co-partners for the reason above mentioned, and that if the same is allowed and approved for any amount against said individual estates that your Honor allow and approve same in line with the allegations set out in

paragraphs 3 and 4 and make such other and further orders as may be necessary herein.

I. R. Bryan, Creditor. C. H. Chernosky, Attorney for Creditor.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL CONTEST BY TRUSTEES OF CLAIM OF FORT BEND COUNTY—Filed with Referee October 23, 1924, at 10:30 A. M.

Now, in the above styled and numbered cause, come J. W. Hampel, George Hamman and T. J. Holbrook, as Trustees for J. H. P. Davis & Company, Bankrupt, and under leave of the Court in addition to its contest herein, filed this their First Amended Answer and Protest herein against and as a further contest to the claims of Fort Bend County, filed in the name of C. Minkwitz, Treasurer and W. W. Ward, Tax Collector, in their attempt to subject the individual estates of the members of said partnership to payment of indebtednesses or claims owing said Fort Bend County before any of the other general creditors' claims are satisfied and by way of said protest and contest thereupon say:

That at the time that said J. H. P. Davis & Company and the individual members thereof were adjudicated bankrupts, as well as at the time that said bank of J. H. P. Davis & Company closed its doors as well as at the time that the [fol. 45] claim of said Fort Bend County was filed neither the individual estates and assets of said members of the bankrupt firm of J. H. P. Davis & Company or the partnership estate and assets were sufficient to pay all the claims and debts owing by said J. H. P. Davis & Company to its creditors; and these trustees further aver and say that if Fort Bend County were permitted to satisfy its claim out of the assets and estates of the individual members of J. H. P. Davis & Company, there would not be sufficient assets remaining to both the partnership assets and estate of J. H. P. Davis & Company and the individual assets and estates of the members thereof to satisfy in full the approved claims of the general creditors of said J. H. P. Davis & Company.

Wherefore, your Trustees respectfully pray as in their original contest and protest heretofore filed herein.

Bryan, Dyess & Colgin, Attorneys for J. W. Hampel, George Hamman, and T. J. Holbrook, Trustees for J. H. P. Davis & Company, Bankrupt, & for I. R. Bryan & Other Creditors.

In United States District Court

Agreement as to Bond, etc.—Filed November 14, 1925

Whereas, a hearing was had before Honorable J. W. Lockhart, Referee in Bankruptcy at Galveston, in a contest of the Trustees and I. L. Bryan and others of the claims [fol. 46] of Ft. Bend County against the estate of individual members of the firm of J. H. P. Davis & Company, to-wit, J. H. P. Davis, R. E. L. Wessendorff and E. Foerster and in connection with said contest there was introduced in evidence a certain county depository bond dated February —, A. D. 1921, being the bond of said J. H. P. Davis & Company and

Whereas in the stenographic statement of the evidence introduced upon said contest some of the names of the signers of said bond were through mistake omitted:

Now therefore, for the purpose of correcting said error and so the Honorable J. C. Hutcheson, Judge of the District Court of the United States for the Southern District of Texas before whom said contest is now pending, may have the matter correctly before him, it is agreed that the makers of said county depository bond, being all the persons who signed the same were and are the following:

J. H. Davis & Company, by J. H. P. Davis, President, as Principal. J. H. P. Davis, E. Foerster, R. H. Darnst, T. A. Wessendorff, T. B. Wessendorff, A. P. George, R. E. L. Wessendorff, T. W. Davis, Real F. Ransom, J. W. Slavin, as sureties.

[fol. 47] And that the bond so introduced in evidenie before the Referee in Bankruptry as aforesaid shows that said parties were the obligors on said bond.

It is further agreed that on or about June 29, 1923, Fort Bend County as first party and T. B. Wessendorff, R. H. Darst, A. P. George, individually and as the duly qualified and acting independent executor of T. W. Davis, deceased, Real F. Ransom and J. W. Slavin as second parties, entered into a certain written agreement which was introduced in evidence on said hearing in reference to the liability of said second parties under said bond aforesaid, which said agreement recited the execution and delivery of the said depository bond, the execution and delivery of the deed of general assignment by J. H. P. Davis & Co., the indebtedness of J. H. P. Davis & Co. as said depository in the sum of $289,583.40 and the further indebtedness of $47,959.21 thereunder, the payment thereon by second parties of $36,000.00 prior to the execution of said agreement and the agreement of the second parties to pay on July 23rd, 1923, on account of the said indebtedness the sum of $72,000.00.

Among other provisions of said contract are the following paragraphs, to-wit:

7. Parties of the first part will take such steps as may be necessary to accept and prove its claim against said assigned estate of J. H. P. Davis & Co. and will receive such dividends as may be paid thereby, and party of the first part shall have the right to enforce as far as possible the collection of said debts against said Davis & Co. and the members of said firm whether the estate shall continue to be administered by said assignees or not.

[fol. 48] 11. The amounts paid and to be paid by the parties of the second part as recited and provided herein shall not constitute payment on the part of J. H. P. Davis & Co. or their estate, but first party shall notwithstanding such payments be entitled to prove his claims for the full amount against said assigned estate and collect the same as far as possible, provided only that after the indebtedness of the party of the first part shall have been fully paid as herein provided, parties of the second part shall have the right to receive any further collection from said assigned estate and shall be subrogated to the rights of party of the first part against said estate and against said J. H. P. Davis & Co. and the members of said firm. In this connection it is provided that any amounts which may be collected from said

estate of J. H. P. Davis & Co. by party of first part after Jany. 1, 1926, shall be credited upon the obligation of the parties of the second part as of the date of such collection and in order of maturity of such obligations.

Dated June 29, 1923.

This agreement may be filed as a stipulation for consideration of the Court in passing upon said contest.

Witness our hands this July 17th, A. D. 1925.

D. R. Pearson, Attorneys for the Trustees. Byran, Dyess, Colgin & Suhr, Attorneys for I. L. Bryan [fol. 49] and Others, Contestants. Vinson, Elkins, Sweeton & Weems, Attorneys for A. P. George, J. W. Slavin, and T. W. Davis Estate. W. N. Foster, Attorneys for Real F. Ransom, R. H. Darst, and T. B. Wessendorff.

Signed by us with understanding that the word obligors as used second page, third line signifies obligors in the capacities as shown by the bond itself.

7/17/25.

Bryan, Dyess, Colgin & Suhr.

IN UNITED STATES DISTRICT COURT

AGREEMENT AS TO PAYMENTS BY T. B. WESSENDORFF ET AL.—
Filed May 18, 1925

UNITED STATES OF AMERICA,
Southern District of Texas:

STATE OF TEXAS,
County of Fort Bend, ss:

It is agreed that the following facts were adduced in evidence on the hearing of the contest of each of the claims of Fort Bend County, against J. H. P. Davis & Company one in the name of C. Minkwitz and the other in the name of W. W. Ward, to-wit: that the following payments were made by the following named parties respectively and on the dates stated respectively on the obligation of J. H. P. Davis & Company arising from the fact that it was the de- [fol. 50] pository of the funds of Fort Bend County and

that it had defaulted and had been declared bankrupts, to-wit:

J. W. Slavin	$6,000 00 on April 11, 1923;
A. P. George	$6,000 00 on April 11, 1923;
R. H. Darst	$6,000 00 on April 11, 1923;
T. B. Wessendorff	$6,000 00 on April 11, 1923;
R. F. Ransom	$6,000 00 on April 11, 1923;
Estate of T. W. Davis	$6,000 00 on April 11, 1923.

Also the sum of $12,000.00 by each of said parties except Ransom on the 6th day of July, 1923, and $12,000.00 by the said Ransom on the 28th day of Sept., 1923, making a total of $108,000.00 which has been received by Fort Bend County on account of said obligation of Davis & Company.

It is further agreed that this statement may be used in the hearing before Judge J. C. Hutcheson of the petition to review the order of the Referee in Bankruptcy in reference to the said claims with the same force and effect as if the same was embodied in and constituted a part of the findings of fact required to be filed by the Referee in such proceeding.

D. R. Pearson, for Trustee. Bryan, Dyess, Colgin & Suhr, Foster & Williams, Attys. for R. F. Ransom, R. H. Darst, and T. B. Wessendorff. Vinson, Elkins, Sweeton & Weems, Atty-. for A. P. George, J. W. Slavin, and T. W. Davis Estate.

[fol. 51] AGREEMENT AS TO PAYMENTS BY T. B. WESSENDORFF ET AL.—Filed May 18, 1925

Agreement of Counsel as to Certain Facts adduced at Hearing before Referee, omitted, being heretofore copied at page 33.

* * * * * * *

In United States District Court

Proof of Claim of J. W. Slavin Against J. H. P. Davis & Company et al.—Filed July 30, 1924, at 2:30 P. M.

Before J. W. Lockhart, Referee

At Richmond, in said Southern District of Texas, on this the 29th day of July, A. D. 1924, came J. W. Slavin of Richmond, Fort Bend County Texas, and says:

That at the time of and prior to the adjudication of bankruptcy herein, the firm of J. H. P. Davis & Company, Bankers, was County depository of said Fort Bend County, and was also depository of school funds in and for said county. That said firm of J. H. P. Davis & Company, and the individual members thereof, had theretofore made and executed depository bonds to secure the funds of Ford Bend County deposited in said bank and to secure [fols. 52] the school funds deposited therein; that among the sureties who executed said bonds were T. B. Wessendorff, A. P. George, T. W. Davis, J. W. Slavin, R. H. Darst and Real F. Ransom, the said J. W. Slavin herein named being this affiant.

This affiant shows that, when the doors of said bank of J. H. P. Davis & Company were closed, it was indebted to the County of Fort Bend for moneys on deposit in said bank in large sums, to-wit, the sum of nearly three hundred thousand dollars; that said county by and through its proper officers made demand upon the six person aforesaid, who were sureties on said bonds, to-wit: T. B. Wessendorff, A. P. George, T. W. Davis Estate (T. W. Davis having died after the execution of said bonds), J. W. Slavin, R. H. Darst and Real F. Ransom, for the payment of the moneys owing by said bank to said County of Fort Bend; that said sureties who were in no way connected with said bank, agreed to pay to said county, and did pay said county, the sum of one hundred and eight thousand dollars, of which sum this affiant paid the sum of eighteen thousand dollars, payment having been made under the bonds aforesaid and having been made in two instalments, one of six thousand dollars, paid on the 13th day of April, 1923, and the other for twelve thousand dollars, paid on the 24th day of July, 1923.

This affiant further shows that the County of Fort Bend agreed with the said six sureties who paid said sum of one hundred and eight thousand dollars, as aforesaid, prior to the payment thereof that said county will prove its claim, for all moneys that were owing by said J. H. P. Davis & Company to it at the time said bank ceased to do business and closed its doors, against the estate of said firm and the individual members thereof, in bankruptcy, and that the county would receive from said estates distri- [fol. 53] butions and dividends and apply same on the total of the indebtedness held by said county against said bankrupts; that in pursuance of said agreement this affiant shows that the County of Fort Bend did in truth and in fact prove its claim for said full amounts against the bankrupts, J. H. P. Davis & Company and the individual members of said firm in bankruptcy. And this affiant here avers the right of the County of Fort Bend to assert its claim against said bankruptys for the full amount thereof, as it existed at the time the said J. H. P. Davis & Company closed the doors of its bank and made a voluntary assignment which constituted the act of bankruptcy committed by said firm and its individual members.

This affiant shows that I. R. Bryan and other creditors of the said J. H. P. Davis & Company have filed pleadings herein challenging the right and authority of the county to prove claims covering the amounts which were paid to said county by the six persons aforesaid, including this affiant, aggregating approximately one hundred and eight thousand dollars. While asserting the right of the county to prove its claim for the full amount of indebtedness owing to it by J. H. P. Davis & Company and the individual members thereof, at the time said bank closed its doors, this affiant says that the facts herein show that to the extent that the six sureties aforesaid made payment to Fort Bend County on the indebtedness of said bankrupts to said county, said six persons became subrogated to the rights of said county against the bankrupt estates of said J. H. P. Davis & Company and the surviving individual members thereof and should it be held, in the administration of said estates in bankruptcy, that said county was not entitled to prove, as a part of its claim the sums paid by said parties to said County, then this affiant says that said six [fol. 54] parties and each of them, by virtue of the rights

of subrogation, they being subrogated to the rights and claims of Fort Bend County against the bankrupt estates to the exent that they have paid the debts of said parties to said county, are each entitled to prove against said bankrupt estates claims for the amounts of money heretofore paid by them.

Therefore, this affiant says that the said J. H. P. Davis & Company and the individual members thereof, to-wit: J. H. P. Davis, R. E. L. Wessendorf and E. Foerster as survivors of said co-partnership and J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, individually, were at and before the filing of said petition and still are, justly and truly indebted unto J. W. Slavin in the total sum of eighteen thousand dollars with interest on the sum of six thousand dollars from the 13th day of April, 1923, and interest on the sum of twelve thousand dollars from the 24th day of July, 1923.

That the co-partnership firm of J. H. P. Davis & Company and its surviving members, J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, have been heretofore in this proceeding adjudged bankrupts and this claim is not only made — said bankrupt firm of J. H. P. Davis & Company but is also made against the individual estates of the said J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, said three surviving members of said co-partnership being liable to this affiant, not only as members of the bankrupt firm of J. H. P. Davis & Company, but are individually liable on account of having signed individually the same bond and instrument which this affiant signed for and on behalf of J. H. P. Davis & Company, and as individual members having so signed said bond individually, they thereby obligated [fol. 55] their individual estates for the payment thereof, and the said obligation became the joint and several obligation of themselves and of the co-partnership.

That no part of said indebtedness, either principal or interest has been paid; that there are no set-offs or counter claims to the same and that affiant has not, nor has any person by his order, or to his knowledge or belief for him, or for his use, had or received any manner of security for said debt whatsoever.

Wherefore, this affiant says that should it be held that the County of Fort Bend has and had the rights to include

in its claim and account against the bankrupts the sums paid to it by this affiant which will operate to that extent for the benefit of this affiant, and should so allow said county's claim, then this alternative claim of this affiant should not be allowed but should be refused; but on the other hand, should the county's claim as allowed herein not be permitted to embrace the moneys paid by this affiant to said county, then and in that event, because of the facts herein shown, this claim should be allowed and this affiant permitted to participate in the distribution of the assets of said bankrupts and he so prays.

J. W. Slavin.

Subscribed and sworn to before me on this the 29th day of July, A. D. 1924. E. M. Mayfield, Notary Public in and for Fort Bend County, Texas. (Seal.)

[fol. 56] In United States District Court

[Title omitted]

Agreement as to Proof of Individual Claims, etc.—Filed January 29, 1926

It is mutually agreed by and between the parties hereto, that J. W. Slaven, A. P. George, T. W. Davis, Real F. Ransom, R. H. Darst and T. B. Wessendorff, filed proofs of claims, each for the sum of $18,000.00 in consequence of the payment to Fort Bend County by each of said named individuals as sureties on the bond of J. H. P. Davis & Company to said County; said claims were filed and allowance prayed, for, only in the event Fort Bend County was unauthorized to make proof in its claim of said sum of $108,000.00 inasmuch as same had been paid by said sureties last named to Fort Bend County.

(a) J. W. Slavin filed his said claim July 30th 1924, and the Trustees filed contest thereto October 15th, 1924;

(b) A. P. George filed his said claim July 30th, 1924, and the Trustees filed their contest thereto October 15th, 1924.

(c) T. W. Davis filed his said claim July 30th, 1924, and the Trustees filed their contest thereto October 15th, 1924.

(d) Real F. Ransom filed his said claim August 2nd, 1924, and the Trustees filed their contest thereto October 15th, 1924.

[fol. 57] (e) R. H. Darst filed his said claim August 2nd, 1924, and the Trustees filed their contest thereto October 15th, 1924.

(f) T. B. Wessendorff filed his said claim August 2nd, 1924, and the Trustees filed their contest thereto October 15th, 1924.

All of said claims were substantially the same in words, figures, amount and effect as the claim filed by J. W. Slaven, which is inserted in the record. All of said sureties asked that their claims be allowed against the partnership of J. H. P. Davis & Company as well as against the individual estates of the members of said partnership.

It is agreed that after allowing offsets urged and set up in the respective contests filed by said trustees to said claims, J. H. P. Davis & Company at the time it closed its doors was indebted to C. Minkwitz as Treasurer of Fort Bend County in the sum of $334,136.24 and that J. H. P. Davis & Company was also indebted to W. W. Ward as Tax Collector of Fort Bend County in the sum of $2,901.53.

This the 27th day of January, A. D. 1926.

Bryan, Dyess, Colgin & Suhr, Foster & Williams, & Vinson, Elkins, Sweeton & Weems, Attorney- for Claimants, Ft. Bend County et al.

[fol. 58] IN UNITED STATES DISTRICT COURT

FINDINGS OF REFEREE—Filed November 14, 1925

At Galveston, Texas, in said District, on the 5th day of Febry., A. D. 1924

Upon the evidence submitted to this Court upon the amended claim of Fort Bend County, C. Minkwitz, Treasurer against said Estates filed herein on January 4th, 1924,

the said claimant and Trustees being represented by counsel, it is ordered that the amount of said claim be reduced from the sum as set forth in the amended affidavit in proof of claim filed by said creditor in said case to the sum of $334,136.24, which said sum shall be entered upon the books of the Trustee as the true sum upon which a dividend shall be computed with interest thereon from the 21st day of March, A. D. 1923, at the rate of 6% per annum, to the 9 day of July, 1923, being the date when petition for adjudication was filed herein.

This said claim is allowed as a claim against the estates of J. H. P. Davis & Co. and against the individual estate of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, jointly and severally.

J. W. Lockhart, Referee in Bankruptcy.

[fol. 59] IN UNITED STATES DISTRICT COURT

REFEREE'S CERTIFICATE—Filed November 14, 1925

I, J. W. Lockhart, one of the Referees of said Court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings:

The matter of the amended claims of Fort Bend County, Texas, W. W. Ward, tax collector, and Fort Bend County, Texas, C. Minkwitz, treasurer, against the above estate and the individual estates of the members of J. H. P. Davis & Company, and the contest filed by I. W. Bryan and other creditors to the allowance of said claims against the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, and same was set down for hearing on or about the 5th day of December, 1924; and after hearing the testimony, a transcript of which is enclosed herewith, the contest was submitted to your Referee, and after due consideration, the above claims were allowed against both the partnership assets of J. H. P. Davis & Company, bankrupts, and against the individual assets of the members of the partnership, namely J. H. P. Davis, R. E. L. Wessendorff and E. Foerster together with interest from the 21st day

of March, 1923 at the rate of 6% per annum to the 9th day of July, 1923, being the date when the petition for adjudication was filed; And it further appearing to your Referee that A. P. George, and A. P. George as Independent Execu-[fol. 60] tor of the will of T. W. Davis deceased, R. F. Ransom, R. H. Darst, J. W. Slavin and T. B. Wessendorff were sureties on the bonds executed by the said J. H. P. Davis & Company, and the individual members thereof to the County of Fort Bend and that some of the said sureties are indebted to J. H. P. Davis & Company and were so indebted at the time of the bankruptcy, it was ordered that before said sureties so indebted would be entitled to receive any dividends from the estate of J. H. P. Davis & Company in connection with their claims by reason of having advanced to the county certain monies on account of the execution of said bond, they, the said sureties should first pay off and satisfy their respective indebtedness to the said J. H. P. Davis & Company, all of which is fully set forth in the formal orders dated the 5th day of December, 1924, and which accompany this certificate.

And the said question is hereby certified to the Judge for his opinion thereon.

Dated at Galveston, Texas, the 2nd day of January, 1925.

J. W. Lockhart, Referee in Bankruptcy.

[fol. 61] IN UNITED STATES DISTRICT COURT

Report of Proceedings Had Before Hon. John W. Lockhart, Referee at Galveston, Texas, Oct. 16, 1924—Filed November 14, 1925

Appearances: Messrs. Bryan, Dyess & Colgin, for Contestants; Judge D. R. Pearson, for the Trustees; W. H. Foster, Esq., and A. B. Wood, Esq., for the Sureties.

OFFERS IN EVIDENCE

Contestants offered in evidence bond signed the — day of February, 1921, by J. H. P. Davis & Company, J. H. P. Davis, R. E. L. Wessendorff, E. Foerster as principals and

by T. B. Wessendorf, T. A. Wessendorff, J. W. Slavin, T. W. Davis, A. P. George, R. H. Darst and Real F. Ransom as sureties.

Contestants offered in evidence the adjudication in bankruptcy of the partnership J. H. P. Davis & Co., as well as of the individual partners August 2, 1923.

AGREEMENT AS TO INDIVIDUALS COMPOSING PARTNERSHIP

It is agreed that the partnership was composed of the following: J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff and E. Foerster.

[fol. 62] T. J. HOLBROOK, being first duly sworn to tell the whole truth, testified as follows:

On direct examination.

By Mr. Colgin:

Q. Your name is Senator Holbrook?
A. T. J. Holbrook, one of the trustees.
Q. You are one of the trustees of the estate——
A. —of J. H. P. Davis & Co., Bankrupt.
Q. Have you made a complete inventory and appraisement of that estate?
A. Yes.
Q. Can you state from that inventory and appraisement of the estate of J. H. P. Davis & Co. what it would probably pay on the dollar to the creditors?
A. It would be a mere guess.
Q. Can you approximate it?
A. No, sir—impossible; I can tell how much collected.
Q. How much have you collected?
A. Approximately $200,000.

Mr. Foster: We want to lodge the formal objection, Your Honor, that the question and answer is irrelevant and immaterial in so far as the rights of the parties represented by Mr. Wood and myself are concerned.

Q. You have collected about $200,000?

A. In cash.

Q. What are the total debts against the estate of J. H. P. Davis & Co?

A. The records will show.

Q. About?

[fol. 63] A. The records will show better than I can tell. I haven't looked it up—more than a million dollars, between a million and a million and a half.

Q. What is the valution?

Mr. Wood: We want to reserve objection and exception to all this class of testimony. We take the position that the condition of the estate is wholly irrelevant and immaterial because this is a law proposition solely, whether or not claimants are entitled to have claims allowed against the bankrupt firm and the individual members who have signed this instrument and that their right to have it done is without reference to the condition of the estate.

Mr. Colgin: Will you agree that both the estate and the individual members will not pay out in full?

Mr. Wood: We don't know what they will do; we hope they will; we don't know.

Q. What is the probable estimate of the assets of J. H. P. Davis & Co.?

A. Don't know—no way of determining.

Q. Why not?

A. Because I don't know the potential value of the land.

Q. What are the actual values of the land?

A. I don't know that, we haven't sold sufficient acreage to determine that.

Q. At what value have you appraised those lands in your report?

[fol. 64] A. I don't recollect, the report will show that. We haven't had a formal appraisement of those lands, just an estimate made by the petitioners.

Q. Have you individually appraised it so you could offer or form an opinion?

A. No, sir.

Q. Have you appraised and formed an opinion as to the probable worth of the estate of each of the individual members of the partnership?

A. No, sir, I have not.

Q. You have filed no paper with the referee or with the Court showing these values?

A. No, sir.

Q. Have you made a complete examination of all the debts and all the assets of the estate of J. H. P. Davis & Co. and the individual members of the partnership?

A. What do you mean by "complete"?

Q. So as to know what property they had and also what debts they had?

A. The records will show that, the Court has approved claims against the estate, as I stated to you, to the extent of more than a million dollars.

Q. Do you know what the individual indebtedness of the individual members of the firm amount to?

A. No.

Q. Has that been filed?

A. I don't know; the records are all in this referee's office.

Mr. Colgin: We call for those documents showing the assets and also the liabilities of J. H. P. Davis & Co., and all these people.

Referree: The only thing I know of is the schedule filed by the bankrupts.

[fol. 65] Mr. Colgin: Is that in your office?

Referee: Yes.

(Schedule produced.)

Q. I will ask you to examine this document?

A. It would take a week.

Q. Can you state from this what the inventory was of the estate of J. H. P. Davis & Co. of all properties both real and personal?

Mr. Wood: It is understood our objection goes to all this.

A. This is a list filed by the bankrupt and inventory.

Q. Did you file an inventory as trustee?

A. It seems to me we filed an inventory—approved this list.

Q. Does that inventory conform to this document filed by the bankrupt?

A. That is my recollection.

Q. Could you from that inventory state just what the assets were inventoried and appraised at?

A. I just told you that they were not appraised.

Q. What does the inventory——

A. Summary of the debts and assets, I can only give you that. The debts are given as $1,237,219.80.

Q. Assets?

A. $1,491,855.57.

Q. What was real estate and what was personal?

A. Real estate? This was partnership I am speaking of not individual, real estate $17,000.

[fol. 66] Q. What is the personal property?

A. Bills, promissory notes and securities at $581,101.70; Cash on hand $19,296.51; Furniture and fixtures $7,500; debts out on open accounts—overdrafts, $835,192.57.

Q. Deposits of money in banks and elsewhere ?

A. $31,694.79.

Q. From your examination of this case, is there any reasonable probability of collection of these notes and overdrafts?

A. We are collecting some, I don't know how many.

Q. What percentage have you collected so far?

A. I haven't figured that out. We have only collected about $200,000 altogether in cash.

Q. Have you made reasonable efforts towards collection of these claims?

A. All of that doesn't represent collections; some of it represents sale of property.

Q. Have you endeavored as trustee, or one of the trustees to make collection of outstanding claims in favor of the estate?

A. Yes.

Q. Have you had any success?

A. Success to the extent I stated.

Q. This $200,000, that represents collection of these claims, and sales——

A. —and sales, which the records will show.

Q. How much represents sales?

A. I can't tell—small amount.

Q. What percentage of these claims have you collected?

A. I can't tell you that without figuring out, the figures will show, this record shows that.

Q. Can you figure it out later on?

A. You can get it here from the record.

[fol. 67] Q. We are trying to have you give an individual opinion from your familiarity with the situation.

A. I haven't made those figures.

Q. Are you sufficiently familiar with the situation as to form an opinion so as you can say whether or not it will pay dollar for dollar?

A. No, sir; that depends, as I told you, the potential value of these lands, because of the oil situation——

Q. We are not calling for any potential values. We are asking for actual market values. What proportion do you think you will be able to collect, approximately?

A. Anything I told you would be a mere surmise, a wild guess.

Q. Have you no opinion whatsoever?

A. No, sir, no well founded opinion.

Q. You have been able to collect as much as fifty per cent——

Mr. Wood: He has stated it would be a mere guess.

Q. Are you also trustee of the individual estates of the partners?

A. Yes, sir—trustee of T. F. Wessendorff——

Q. Are you and the other trustees, George Hamman and J. W. Hampil—are you any more familiar with the probable worth of the estates of these partners than you are of the partnership?

A. I don't know.

Q. Have you any opinion as to the outstanding indebtedness, what is owing by the individual members, as individuals?

A. Nothing more than as reflected by the records.

Q. Have you any knowledge as to whether or not the assets exceed the liabilities?

A. No.

[fol. 68] E. Foerster, being first duly sworn to tell the whole truth, testified as follows:

On direct examination.

By Judge Bryan:

Q. You were one of the partners in the firm of J. H. P. Davis & Co.?

A. Yes, sir.

Q. Private partnership, doing business in Houston, Richmond and Rosenberg?

A. Yes, sir.

Q. Please state whether or not during the course of business, conducting that banking business, that it was so stated by you or any other members of the firm of J. H. P. Davis & Co. to customers, that the personal assets and private fortunes of each and every member of the firm was liable for J. H. P. Davis & Co's. debts, as security for any deposits made in the J. H. P. Davis & Co. bank?

Mr. Wood: We object to that as being wholly irrelevant and immaterial, the bond speaks for itsel in reference to that matter and no claim is made with reference to any question of estoppel that might enter, it is simply a legal proposition presented on this written instrument as to the liability of these people on this instrument, and whether or not they made statements to anybody else that their personal fortunes were behind the bank is irrelevant and immaterial.

Mr. Foster: It is understood that any objection made by Mr. Wood or myself, are joint as to the sureties we represent.

[fol. 69] A. It was generally understood, as I understood it, that everything that the bank had, including Mr. Davis and myself would be absolutely behind every cent in deposit in our bank. And I remember the first time I was called to Austin about some private banking affairs, when I was talking with Mr. Desel and Mr. Giddings and a banker from Elgin, I don't recall his name and we were discussing then the security of the private bank, and the state bank, just starting state banks at the time, and the banker from Elgin made the statement, take for instance

our bank, if we want to limit our security to creditors—in a $25,000 National or $20,000 State bank, anything happens we throw up $25,000 or $20,000, but in this way every cent we got except our homestead is behind it.

Q. Was any talk of that kind made in Fort Bend County and Richmond?

A. That was on the train——

Mr. Wood: We object to that question as leading.

Mr. Foster: We want to add to the objection heretofore made, that the conversation detailed is wholly hearsay, res inter alias acto, conversations between parties other than those involved here.

Q. Was or was not any such talk made by you to depositors or would-be depositors in the J. H. P. Davis banks at Richmond and Rosenberg?

Mr. Wood: One moment; we want to urge the same objection to all this class of testimony heretofore offered.

[fol. 70] Judge Bryan: Yes, treat it as being objected to.

Mr. Colgin: Contestant does not seem to be represented, are you speaking for claimant?

Mr. Wood: Mr. Foster and I will represent claimants as if Mr. Locke were here making the objection.

A. I have made these statements very often, especially when the state bank started, explaining the difference between the state bank security——

Q. Explaining to——

A. —the different depositors making inquiry, just explaining, and I told them the way I understood it, that everything Mr. Davis and the others had, would go behind it in addition to what the bank has, and I understood it all the time and didn't think anything else. I thought that everything I had or Mr. Davis had would have to go in case anything happened, except the homestead, and I explained that to depositors, customers, because they came in there frequently to know just the status of the bank and I explained it from my standpoint.

Q. Please state what Mr. Davis' standing or reputation as a man of property and large holdings was in Fort Bend County as to whether he has a reputation of being a man of considerable wealth?

A. I always understood and it was generally understood there he was a very wealthy man.

[fol. 71] On cross-examination.

By Mr. Foster:

—. Mr. Foerster I want to get clearly before the Court who were the members of that partnership: J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff and yourself (E. Foerster)?

A. Yes, sir.

Q. You four constituted the only members of that firm at the time of the bankruptcy and prior thereto?

A. Yes, sir.

Q. Mr. R. H. Darst wasn't a member of the firm?

A. No.

Q. Was Mr. Real F. Ransom a member?

A. No, sir.

Q. Mr. T. B. Wessendorff was not?

A. No, sir.

Q. J. W. Slavin was not?

A. No, sir.

Q. T. W. Davis was not?

A. No, sir.

Q. A. P. George was not?

A. No, sir.

Q. Those six parties whose names I have mentioned beginning with Darst and ending with George, had no proprietary interest whatever in the partnership business?

A. None whatsoever.

Q. They were merely depositors and customers were they not?

A. Only.

Q. The firm members of J. H. P. Davis & Co. regarded Mr. Davis as president?

A. Yes, he was president.

Q. And he signed as president?

A. Yes, sir; he was president.

[fol. 72] On redirect examination.

By Mr. Colgin:

Q. At the time you signed this bond individually, was it your intention at that time to sign as a partner or as a surety?

Mr. Wood: We object to that because extraneous evidence is not admissable to vary the terms of the instrument itself; the bond must be construed on its face as the bond speaks for itself.

Mason Briscoe, being first duly sworn to tell the whole truth testified as follows:

On direct examination.

By Judge Bryan:

Q. Your name is Mason Briscoe?
A. Yes, sir.
Q. Where do you live?
A. Fort Bend County, Foster, Texas.
Q. You were a depositor in J. H. P. Davis & Co's. bank and proved up a claim here?
A. Yes.
Q. How long have you lived in Fort Bend County?
A. I was born there.
Q. Mr. Brisco, please state whether or not any member of the firm of J. H. P. Davis & Co. discussed the matter in your presence or hear of them so doing, as members of the partnership bank being liable for the entire property of both the partnership and the individual members being liable for the debts of J. H. P. Davis & Co.?

[fol. 73] Mr. Wood: Our objection goes to all this.

A. Judge, I have heard Mr. Foerster and Mr. Wessendorff each say numerous times that the entire estate of each one of *of* the members of the firm of the Davis bank was liable for deposits. I don't remember ever hearing Mr. Davis himself say that, but I have heard Mr. Foerster and I have heard Mr. Tom Wessendorff.

Q. Please state if there was any common understanding in the community Fort Bend County, as to the personal liability of members of the firm of J. H. P. Davis & Co. for deposits, debts.

A. As for the understanding, I would say that everybody I know of in Fort Bend County was of that opinion, that was a general understanding by depositors; and I heard one man make the expression at the time the bank closed, that he had heard ever since he had been in Fort Bend County that Mr. Davis owned an acre of land and a store for every dollar on deposit.

On cross-examination:

Q. You knew anyway that individual partners are all liable in any mind [kind] of partnership—you have been knowing that since a boy haven't you?

A. I was of the opinion that they were perfectly reliable——

Q. But you have been of the opinion since a boy that anybody that goes into a partnership, that all the partners are behind the partnership.

A. I think so, yes.

Q. And you knew this band was a partnership?

A. Yes, sir.

[fol. 74] T. J. Holbrook, recalled, testified as follows:

On direct examination.

By Mr. Colgin:

(It is understood we have introduced in evidence the adjudication in bankruptcy of the Individual members and also of the J. H. P. Davis partnership.)

Q. Since you have been appointed trustee has any new development taken place to insure the payment of any of the liabilities of J. H. P. Davis & Co.?

A. Except oil, oil has been discovered in paying quantities and new localities right near these lands.

Q. How far from these lands?

A. Just how far that Big Creek development is—some of the others can answer.

Q. That belongs to J. H. P. Davis or——

A. Not where oil has been found, but oil has been found near the J. H. P. Davis land.

Q. That is the individual, not near the lands of J. H. P. Davis & Co.?

A. No; J. H. P. Davis, individually.

Q. How many miles from his land?

A. I can't answer that exactly.

Q. Approximately?

A. I can't tell that; there are others who can.

Q. What are the highest offers you have received for these lands?

A. I haven't received any.

Q. Has it been on the market?

A. Yes.

Q. And without any probability of realizing on them?

A. You say these lands, we have sold a lot of the land.

[fol. 75] Q. I mean the oil land you have been talking about?

A. None that I recall. Mr. Hampil may have.

Q. How long have you had them on the market?

A. Several months.

On cross-examination.

By Mr. Woods:

Q. You don't mean you had them on the market in the sense that you have set any price?

A. No, we just got an order from Court authorizing us to sell them. Mr. Hampil has been on the ground and Judge Pearson, and if any offers have been made they have been made to them.

Q. In other words, the trustees some months ago got authority from this Court to lease some of the land for oil purposes?

A. Or sell.

Q. But you did lease it at that time—did you lease some of the land?

A. We leased one tract, one or two, the records will show that, three or four thousand acres. The trustees I may say by way of explanation, they had frequent meetings about the condition of this estate, and our efforts have been di-

rected toward trying to work it out in the best possible shape we could. We have realized that it would not be to the best interest of the estate to put these lands under the hammer and sell them because we couldn't get the value of them in that way, and the conditions haven't been good in Fort Bend County, on the contrary have been very bad up to very recently, made about half the normal crop this year, but preceding this year they haven't made any crop in five years; and we haven't been trying to sell these lands. We [fol. 76] have thought if we could wait just a little while that agricultural conditions might get better, or there is the very great probability of oil being discovered in larger quantities and localities and that oil is near, right by us, and for that reason we haven't tried to sell, have been waiting a little to see what would develop. We realize that the salvation of the estate depends to a large extent on what we will get out of those lands.

Q. What you will get out of the lands is purely speculative so far?

A. Not purely, wouldn't use the word "purely".

Q. Because you have so far not been offered anything at all, although you have made attempts and used your best efforts and diligence to realize on these lands.

A. Yes.

On cross-examination.

By Judge Pearson:

Q. Isn't it a fact that the trustees have made a contract for a large tract of Mr. Davis' land with the Pathfinder Oil Co.?

A. Yes, sir, that is the lease I referred to.

Q. And they have been doing drilling on the individual lands of Mr. Davis during the past year?

A. Yes—for several months.

Q. And they are asking, are they not, for an extension of their privileges under that lease?

A. They are seeking it for Salt Dome, primarily.

Q. Has there been any special effort to sell the individual lands of Mr. Davis?

A. No, just like I stated.

Q. Hasn't it been the policy of the trustees to await developments of this oil before endeavoring to sell these lands?

A. Yes, to use a common expression we are banking pretty heavily on the possibility of getting something out [fol. 77] of the oil or oil prospects lying so near.

On redirect examination.

By Judge Bryan:

Q. Isn't it a fact that when you and the other trustees looked into the matter you found that as a result of the several years bad conditions, hardly any crops etc., in Fort Bend County, that really there was no sale for real estate, for lands during 1923?

A. That is about the condition.

Q. Up to this time?

A. Yes.

By Mr. Colgin:

Q. And if these lands are sold now it will be at a sacrifice?

A. Yes, we have merely gotten a blank order to sell real estate, and in case we get an offer for any part that will justify it, we will send notice to the creditors and bring the offer here for hearing.

Mr. Foster: We introduce certified copy of contract made between the County of Fort Bend and R. H. Dost, [Darst], Ransom, Slavin, T. B. Wessendorf [Wessendorff] A. P. George and executor of the estate of T. W. Davis, deceased, and call attention to that provision of the instrument which requires and directs the county to prove the entire claim, its entire claim against the bank.

Judge Bryan: We object to it as irrelevant and immaterial.

[fol. 78] Mr. Foster: There is only one bond before the Court, and that is the bond for $300,000 and we now introduce certified copy of the bond as depository of the school funds, being bond for $50,000 bearing date February 19, 1921, and the signers are the same as the signers on the proceding [preceding] bond already before the Court.

Judge Bryan: The same objection, that it is irrelevant and immaterial to any issue in this case.

Judge Pearson: Mr. Foster you will admit will you not, that R. H. Dorst [Darst] is indebted to J. H. P. Davis & Co. in the amount of $5,660.71 by reason of overdrafts?

Mr. Foster: I don't remember the amount, but I know there is an overdraft, that is practically correct.

Judge Pearson: You will admit, will you Mr. Wood, that A. B. [P.] George is indebted to J. H. P. Davis & Co. in the sum of $6,382.93?

Mr. Wood: (Subject to our right of contest) that is the amount. Without reference to offsets, Mr. George owed the bank $6,300-odd.

Judge Pearson: Mr. Foster, will you admit that Mr. Ransom is also indebted to J. H. P. Davis & Co. in the sum of $6,307.31?

[fol. 79] Mr. Foster: That is approximately correct.

Judge Pearson: Gentlemen, you will admit that Davis & Co. and the surviving members of the firm on or about March 31, 1923, executed a general assignment under the laws of the State of Texas for the benefit of creditors and appointed a trustee who qualified and acted as such until the adjudication in bankruptcy?

Mr. Wood: That is a fact.

Judge Bryan: It may be stated here, that Mr. T. A. Wessendorf [Wessendorff] killed himself about the 21st day of March, 1923, and immediately thereafter there was filed an assignment to the trustees and the adjudication in bankruptcy was of August 2, 1923.

Mr. Wood: We take the position that it [is] all irrelevant and improper but those are the facts.

Judge Pearson: You introduced all the contract between the county of Fort Bend and these sureties?

Mr. Foster: Yes, sir.

Judge Pearson: The trustees offer that also.

[fol. 80] [File endorsement omitted.]

In United States District Court

Decree of Referee on Claim of Fort Bend County, Texas—Filed by Referee on December 11, 1924

Be it remembered that the amended claim of Fort Bend County, Texas, C. Minkwitz, Treasurer, against the above estates came on for hearing, together with the contest filed by I. W. Bryan and other creditors to the allowance of said claim against the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, and the Court after hearing said amended claim and the evidence thereon is of the opinion that said claim should be allowed against the Estate of J. H. P. Davis & Company and against the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, for the sum of $334,136.24, with interest thereon from the 21st day of March, A. D. 1923, at the rate of 6% per annum, to the 9th day of July, A. D. 1923, being the date when the petition for adjudication was [fol. 81] filed; and the Court is further of the opinion and so orders that the said contest by I. W. Bryan and other creditors be and the same is disallowed.

It is therefore on this the 5th day of December, A. D. 1924, considered, ordered, adjudged and decreed that the said amended claim be allowed against the Estate of J. H. P. Davis & Company and against the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, jointly and severally, for the sum of $334,136.24, with interest thereon at the rate of 6% per annum from the 21st day of March, A. D. 1923, to the 9th day of July A. D. 1923, and the amount for which the said claim is hereby allowed shall be entered upon the books of the Trustees as the true sum upon which dividends shall be computed.

And it further appearing to the Court that A. P. George and A. P. George a independent executor of the will of T. W. Davis, deceased, R. F. Ransom, R. H. Darst, J. W. Slavin and T. B. Wessendorff were sureties on the bonds executed by the said J. H. P. Davis & Company and the individual members thereof to the County of Fort Bend, and that some of said sureties are indebted to J. H. P. Davis & Company and were so indebted at the time of the bankruptcy as follows:

R. H. Darst in the sum of $5,660.31 with 6% interest from June 15, 1923;

R. F. Ransom in the sum of $6,307.31 with 6% interest from March 21, 1923; and

A. P. George in the sum of $6,382.93, with 6% interest from March 21, 1923;

[fol. 82] And it further appearing that they have paid certain moneys to the County of Fort Bend on account of being sureties on said bond;

It is ordered, adjudged and decreed that the said sureties so indebted to the Estate of J. H. P. Davis & Company, before they will be entitled to receive any dividends from the estate of J. H. P. Davis & Company in connection with these claims on account of having advanced to the County certain moneys on account of the execution of said bonds, shall first pay off and satisfy their respective indebtedness to the said J. H. P. Davis & Company.

J. W. Lockhart, Referee.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR REVIEW—Filed January 29, 1926

Now in the above styled matter, come J. W. Hampel, George Hamman and J. T. Holbrook, as Trustees for J. H. P. Davis & Company, bankrupt, and I. W. Bryan and other creditors, and file this their petition for a bill of review and urge that the Honorable Referee in Bankruptcy erred in his order and decree, filed herein on to-wit: December 12th, 1924, in the following particulars:

[fol. 83] 1

The Honorable Referee in Bankruptcy erred in holding that the claim filed herein in the name of C. Minkwitz, Treasurer of Fort Bend County, had priority over the claim of the other general creditors of the partnership in consequence of the surety bond given by J. H. P. Davis & Com-

pany, Bankers, Unincorporated, of Fort Bend, County, Texas, having been signed as principal by said Company and J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff, E. Foerster, T. B. Wessendorff, T. W. Davis, R. H. Darst, A. P. George, Real F. Ransom and J. W. Slavin as sureties and accordingly in entering the following judgment and decree:

"Be it remembered that the amended claim of Fort Bend County, Texas, C. Minkwitz, Treasurer, against the above estates, came on for hearing, together with the contest filed by I. W. Bryan and other creditors to the allowance of said claim against the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, and the Court, after hearing said amended claim and the evidence thereon is of the opinion that said claim should be allowed against the Estate of J. H. P. Davis & Company and against the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, for the sum of $334,136.24, with interest thereon from the 21st day of March, A. D. 1923, at the rate of 6% per annum, to the 9th day of July, A. D. 1923, being the date when the petition for adjudication was filed; and the Court is further of the opinion and so orders, that the said contest by I. W. Bryan and other creditors be and the same is disallowed.

"It is, therefore, on this the 5th day of December, A. D. 1924, considered, ordered, adjudged and decreed that the [fol. 84] said amended claim be allowed against the Estate of J. H. P. Davis & Company and against the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, jointly and severally, for the sum of $334,136.24 with interest thereon at the rate of 6% per annum from the 21st day of March, A. D. 1923, to the 9th day of July, A. D. 1923, and the amount for which the said claim is hereby allowed shall be entered upon the books of the Trustees as the true sum upon which dividends shall be computed.

"And it further appearing to the Court that A. P. George and A. P. George as independent executor of the will of T. W. Davis, deceased, R. F. Ransom, R. H. Darst, J. W. Slavin and T. B. Wessendorff were sureties on the bonds executed by the said J. H. P. Davis & Company and the

individual members thereof to the County of Fort Bend, and that some of said sureties are indebted to J. H. P. Davis & Company and were so indebted at the time of the bankruptcy as follows:

R. H. Darst in the sum of $5,660.31 with 6% interest from June 15, 1923;

R. F. Ransom in the sum of $6,307.31, with 6% interest from March 21, 1923; and

A. P. George in the sum of $6,382.93, with 6% interest from March 21, 1923;

"And it further appearing that they have paid certain moneys to the County of Fort Bend on account of being sureties on said bond;

"It is ordered, adjudged and decreed that the said sureties so indebted to the Estate of J. H. P. Davis & Com- [fol. 85] pany, before they will be entitled to receive any dividends from the estate of J. H. P. Davis & Company in connection with these claims on account of having advanced to the County certain moneys on account of the execution of said bonds, shall first pay off and satisfy their respective indebtedness to the said J. H. P. Davis & Company."

That said order and decree, though dated on the 5th day of December, A. D. 1924, was in fact and in truth only presented to the attorneys for said Trustees on the 12th day of December, A. D. 1924, and filed as an order and decree on said last named day and date.

That the Referee has erred in this: That prior to rendering said order and decree said Referee, under date of December 5th, 1924, wrote the attorneys for the Trustees his opinion and gave the grounds on which said order was rendered, as follows:

"Believing that the bond of J. H. P. Davis to the County of Fort Bend, signed by J. H. P. Davis & Co., by J. H. P. Davis, President, E. Foerster and R. E. L. Wessendorff, as well as by six sureties, was signed by J. H. P. Davis & Co., as a partnership and by the three members of the partnership individually for the purpose of binding both the partnership assets and the individual assets of the members of the partnership, I have this day allowed the above claim to be filed both against the partnership and the in-

dividual assets. Since Messrs. Foster & Williams are the attorneys for the parties filing the claim, I suggest that the proper order be drawn by them, submitted to the various counsels interested, for their approval and forwarded to me to be signed and filed as of this day."

[fol. 86] Your petitioners allege that in said opinion the Court in effect clearly expressed the opinion that each individual member of the firm signed as principal and created a separate and distinct original liability from them or the firm, which bound and obligated their individual estates, whereas the bond itself on its very face plainly shows that J. H. P. Davis & Company signed as principal and that each of the individual members of the firm attempted to sign as sureties for said principal, J. H. P. Davis & Company.

Your petitioners say that the individual members of said firm were either liable as sureties, if a surety can be liable in such a case or not liable at all, because the bond itself shows that J. H. P. Davis & Company signed as principal and then the individual members signed as sureties.

Your petitioners further say, however, that said individual members could not be liable as sureties, and that, therefore the effect of the decree itself is that the indorsements and signatures of the individual members of the partnership of J. H. P. Davis & Company signed as sureties on said bond have made and rendered the individual estates of each of them as jointly and severally liable, so that as a result thereof Fort Bend County is an individual creditor of said partners and entitled by reason thereof to have a priority of payment out of the separate estates of each and all of said partners free and prior to the claims of any general creditors of J. H. P. Davis & Company, the partnership; whereas the aforesaid Trustees, as contestants, submitted and contended that the individual partners of said partnership who have also been individually adjudged bankrupt, at the time that they signed said bond [fol. 87] were not and could not become sureties for the firm of which they were individual members, as they were already jointly and severally liable when the partnership signed its name as principal and that the subsequent signature or indorsement of each individual member could give

the bond no added value or security, inasmuch as said bond was and is a non-negotiable instrument and not a negotiable instrument, where an individual partner may render his individual estate primarily liable by signing as an indorser or surety.

These Trustees, as contestants, claim that there is a distinction to be drawn between negotiable instruments and an instrument not negotiable, where the individual member of a partnership signs as indorser or as surety to the partnership. The trustees, therefore, say that the Referee has erred in holding that Fort Bend County was not a general creditor of the partnership participating on an equal footing with all of the other general creditors of the partnership in the partnership assets and the separate estates of the individual members of said partnership, and your petitioners respectfully show and submit that the opinion on which said order and decree is based in effect adopts this view, but holds erroneously that in signing their individual names they did so as individuals in an original undertaking and not as sureties and if sureties would be entitled to contribution and therefore, your petitioners now submit that said order, decree and ruling of the Referee was erroneous.

Wherefore, your petitioners pray that said order and decree of the Referee in Bankruptcy be reviewed by this Honorable Court and that your petitioners be granted [fol. 88] such other and further relief as to this Honorable Court may seem just and your petitioners will ever pray, etc.

Bryan, Dyess & Colgin, Attorneys for J. W. Hampel, George Hamman and J. T. Holbrook, Trustees of J. H. P. Davis & Company, Bankrupt, and I. W. Bryan and Other Creditors.

It is agreed that this may be filed as a substitute and that the original was duly filed within time required by law. 1/29/26.

Bryan, Dyess, Colgin & Suhr, for Trustees & Bryan and Other Creditors. Foster & Williams and Vinson, Elkins, Sweeton & Weems.

[File endorsement omitted.]

[fol. 89] IN UNITED STATES DISTRICT COURT

OPINION—Filed November 14, 1925

Appeal from the Action of the Referee Allowing Double Proof in the Matter of the Claim of Fort Bend County

I have carefully considered the question raised in the light of the briefs and authorities submitted by the parties, and I cannot escape the conclusion that this is a case in which both the partnership and the individual partners have undertaken to bind and have bound themselves; the bonds which form the basis of the claim show plainly that they were executed by the partnership as principal and by the partners as individuals, together with others as sureties.

I am not impressed with the argument that a partner cannot be a surety for his firm and that therefore their signatures created no obligation. Neither am I impressed with the argument that if they did sign as sureties they are only liable directly for their proportion of the debt.

The substance and not the form is the desideratum in a transaction of this kind and that substance here is that this partnership as a partnership signed the obligation; the partners as individuals signed the obligation and that as between a creditor and them, the partnership and each individual are jointly and severally liable for the whole amount.

[fol. 90] Whether in this kind of case, where the partnership assets are less than the individual assets the law ought to give a preference to persons who have secured the specific individual obligation of each partner in addition to that of the partnership, is another matter; but that the statute does expressly give such preference in this kind of case, I think does not admit of doubt.

The argument which is pressed with so much force by the general creditors, that they understand at all times that in dealing with this partnership bank, they were relying upon the personal liability of the individuals as well as of the partnership, is not supported by any proof of the securing of such individual agreement in the case of any particular creditor of the partnership, while the County

does present a specific and definite agreement, not only of the partnership, but of the individual partners composing it.

The weight of American authority has always been in favor of double proof, and this is one of those cases where the liability of the partners is joint and several and in which a creditor may file double proof both against the partnership assets and against the individual assets of each partner.

The finding of the Referee is therefore affirmed. Houston, Texas, November 12, 1925.

J. C. Hutcheson, Jr., Judge.

[fol. 91] In United States District Court

Decree Confirming Referee's Order Allowing Claim of C. Minkwitz—Filed December 3, 1925

Upon the consideration by this Court of the petition filed in the name of George Hamman, T. J. Holbrook and J. W. Hampel, as Trustees in the bankruptcy of J. H. P. Davis & Company, bankrupts, by certain general creditors of the copartnership of J. H. P. Davis & Company, bankrupts, only, to review the order of said Referee on findings made February 5, 1924, said order having been made and entered the 5th day of December, 1924, on the claim of C. Minkwitz in behalf of Fort Bend County, Texas, for the sum of $334,136.24, with interest thereon from the 21st day of March, 1923, at the rate of 6% per annum, to the 9th day of July, 1923, together with the certificate of said Referee and the papers accompanying the same, including the evidence presented on said hearing before the said Referee, the Court does on this the First day of December, 1925, order, adjudge and decree that the said order of said Referee approving the said claim be and the same is hereby confirmed in each and every particular.

J. C. Hutcheson, Jr., Judge.

[fol. 92] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed December 9, 1925

To the Honorable J. C. Hutcheson, Jr., District Judge:

Now comes J. W. Hampel, George Hamman and J. T. Holbrook, as Trustees for J. H. P. Davis & Company, Bankrupt and I. R. Bryan and other creditors, and feeling themselves aggrieved by the decree made and entered in this cause on the 1st day of December A. D. 1925, affirming the order and decree of J. W. Lockhart, Referee in Bankruptcy, allowing double proof to be made in the matter of the claim of C. Minkwitz, Treasurer of Fort Bend County, Texas, for the sum of $334,136.24 and wherein these petitioners' opposition and contest thereto was overruled and denied, they, the said petitioners do hereby appeal from said decree or order of the Honorable District Court for the Southern District of Texas, to the Circuit Court of Appeals for the Fifth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record proceedings, the papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, and desiring to supersede the execution of the decree, petitioners here tender bond in such amount as the Court may require for such purpose, and pray that with the allowance of the appeal a supersedeas be issued.

Bryan, Dyess, Colgin & Suhr, Attorneys for Petitioners J. W. Hampel et al.

[fols. 93-96] The petition is granted and appeal is allowed, upon the petitioners filing a bond or making a deposit, in the sum of $250.00 with sufficient sureties to be approved by the Clerk, to be conditioned as required by law.

This the 4th day of December, A. D. 1925.

J. C. Hutcheson, Jr., Judge of the United States District Court for the Southern District of Texas, Galveston Division.

Bond on appeal for $250.00, approved and filed December 9, 1925, omitted in printing.

[fol. 97] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed December 9, 1925

Now in the above styled matter and cause come J. W. Hampel, George Hamman and J. T. Holbrook, as trustees for J. H. P. Davis & Company bankrupt, and also come I. R. Bryan and other creditors and filed in connection with their appeal in this case the following assignment of errors:

I

That the Honorable District Court of the United States for the Southern District of Texas, erred in affirming the ruling and decision of the Referee, J. W. Lockhart, in allowing double proof to be made in said estate.

II

That the Honorable District Court of the United States for the Southern District of Texas erred in holding that proof could be made in favor of C. Minkwitz, as treasurer of Fort Bend County, against the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, who were members of the bankrupt partnership of J. H. P. Davis & Company and also co-sureties on the statutory bond signed by said bankrupt as principal, and in holding that said claim should have priority over the claims of the general creditors of the estate of J. H. P. Davis.

III

That the Honorable District Court of the United States for the Southern District of Texas erred in affirming the de-
[fol. 98] cision of the Referee J. W. Lockhart, of Galveston, Texas, and in holding that Fort Bend County was entitled to priority in having its claim paid out of the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, before any other claims of the general creditors could be satisfied out of said individual estates;

and especially was this holding erroneous in view of the undisputed fact that the bond given by said J. H. P. Davis & Company was signed as sureties by J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, who were members of said partnership firm, as well as by other sureties not members of said partnership firm.

IV

That the Honorable District Court of the United States for the Southern District of Texas erred in holding that nevertheless and notwithstanding the fact that Fort Bend County had already been paid and had, therefore, received from six of the sureties who were not members of said partnership firm of J. H. P. Davis & Company the sum of $108,000.00 it could file and be allowed its entire claim against the individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, without giving said claim the credit entitled by reason of said payment.

V

That the Honorable District Court of the United States for the Southern District of Texas erred in holding that nevertheless and notwithstanding the fact that the bond which was signed by J. H. P. Davis and Company as principal and as sureties, by J. H. P. Davis, R. E. L. Wessen-
[fol. 99] dorf and E. Foerster, who were members of said partnership and other sureties not members of said firm, obligated the sureties to the obligee for the sum of only $300,000.00 said obligee could nevertheless file and be allowed its entire claim of $334,136.24, which was in excess of said liability created by and under said bond.

VI

The Honorable District Court of the United States for the Southern District of Texas, erred in holding in effect that the equitable doctrine of contribution did not apply as to the sureties on the bond in question, and that, therefore Fort Bend County could rightfully file and be allowed its entire claim against the individual estates of the members of J. H. P. Davis & Company and thus and thereby give

and allow to the sureties who were not members of said partnership firm and who have paid Fort Bend County said sum of $108,000 preference and priority over the general creditors of the partnership firm; whereas the Court should have held that each surety was liable for his proportionate share, and that the sureties who made the payment of $108,000.00 could only be allowed, whether directly or indirectly, only such sum or amount as was in excess of their proportionate part of the obligation under

VII

The Honorable District Court of the United States for the Southern District of Texas erred in holding in effect that the partners of J. H. P. Davis & Company, who signed the statutory bond in question, signed the same as individuals although it was plainly recited in the bond as well as [fol. 100] after their signature that they had signed the same as sureties for their principal J. H. P. Davis & Company.

VIII

That the Honorable District Court of the United States for the Southern District of Texas erred in not holding in effect that C. C. Minkwitz, as treasurer of Fort Bend County (if at all) could only file his claim against the individual estates of the partners of J. H. P. Davis & Company for such amounts only as represented the proportionate obligation of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster on the bond in question.

Bryan, Dyess, Colgin & Suhr, Attorneys for J. W. Hampel, et al.

[fol. 101] Clerk's certificate to foregoing transcript omitted in printing.

NOTE RE WAIVER OF CITATION

Waiver of Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 4737

J. W. HAMPEL et als., Trustees in Bankruptcy, etc., et als.,

versus

C. MINKWITZ, as Treasurer of Fort Bend County, Texas

ARGUMENT AND SUBMISSION IN PART AND CONTINUANCE TO MARCH 10TH FOR FURTHER ARGUMENT

Extract from the Minutes of March 9th, 1927

On this day this cause was called, and, after argument by E. B. Colgin, Esq., for petitioners, in part, was continued until tomorrow morning at 11 o'clock, for further argument.

No. 4737

J. W. HAMPEL et als., Trustees in Bankruptcy, etc., et als.,

versus

C. MINKWITZ, as Treasurer of Fort Bend County, Texas

FURTHER ARGUMENT AND SUBMISSION

Extract from the Minutes of March 10th, 1927

On this day this cause, as continued from yesterday, was called, and, after further argument by E. B. Colgin, Esq., for petitioners, and W. N. Foster, Esq., and Fred R. Switzer, Esq., for respondent, was submitted to the Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4737

J. W. HAMPEL et als., Trustees in Bankruptcy etc., et als., Petitioners,

versus

C. MINKWITZ, as Treasurer of Fort Bend County, Texas, Respondent

Petition to Superintend and Revise from the District Court of the United States for the Southern District of Texas

Lewis R. Bryan and E. B. Colgin, (Bryan, Colgin, Suhr & Bering on the brief), for Petitioners.
W. N. Foster and Fred R. Switzer for Respondent.

Before Walker, Bryan, and Foster, Circuit Judges

OPINION OF THE COURT—Filed March 25th, 1927

WALKER, Circuit Judge:

J. H. P. Davis & Co., a partnership engaged in the banking business, to secure performance of its obligations as depository of funds belonging to Fort Bend County, Texas, gave a bond which was signed, by one of the firm, in the partnership name, as principal, and by ten individuals as sureties, four of those individuals being the partners composing the firm. The partnership and the three surviving members of it were adjudged bankrupt. After signers of the bond who were not members of the bankrupt firm had paid $108,000.00 on the amount, $334,136.24, for which the firm was liable under the bond, the claim of the County for the full amount of $334,136.24 was allowed against the partnership estate, and against the estates of the three partners, as individual debts of such partners. Part of the $108,000.00 was paid prior to bankruptcy, but after the partnership had made a general assignment of its assets for the benefit of its creditors, and the remainder of that amount was paid after bankruptcy. Results of the court's action

were that the amount of the county's allowed claim against the partnership assets was the same as it would have been if the payment of $108,000.00 had not been made, and the county was allowed to participate in the individual assets of the three partners on equal terms with individual creditors and in preference to other partnership creditors.

Partnership debts are debts of the members of the firm, and the individual liability of the members is not collateral, like that of a surety, but is primary and direct, whatever priorities there may be in the marshalling of assets. Francis v. McNeal, 228 U. S. 695. The provision of the Bankruptcy Act (§5 f & g.) for the separate administration of the estates of a partnership and of the individual partners is declaratory of the equitable rule as to marshalling partnership and individual assets. Schall v. Camors, 250 Fed. 6; 251 U. S. 239; Farmers Bank v. Mechanics National Bank, 240 U. S. 498; Collier on Bankruptcy (13th Ed.), 262. The principle applicable to marshalling assets is that he who has a right to resort to two funds, to one of which alone another party may resort, must first exhaust the one to which the other party may not resort before coming upon the one to which both may resort. Savings Bank v. Creswell, 100 U. S. 630. One who is a creditor of a partner but not of the firm can resort only to the individual estate of his debtor, which includes that debtor's interest in any surplus of partnership assets remaining after the payment of partnership debts.

A result of the application of the principle of marshalling assets is that creditors who can resort only to the individual estates of partners must first be paid therefrom, only the surplus remaining after they have been paid in full being applicable to the payment of debts owing to partnership creditors. The above cited provisions of the Bankruptcy Act plainly indicate that the words "individual debts" were meant to describe debts of one or more of the partners for which the partnership is not liable. It is not material to inquire whether by signing the bond as sureties the partners added anything to their primary and direct obligation resulting from the partnership of which they were members being the principal obligor on the bond; as, whether they may or may not in some respects be treated as sureties for their own debt, the individual property of each partner is primarily a fund for the payment of his

debts for which the partnership is not liable, only the surplus of that property remaining after paying debts owed by the owner and not by his firm being applicable to the payment of debts for which the firm is liable. It follows that the court erred in allowing the debt to the county against the estates of the three partners, as individual debts of the partners.

The fact that sureties other than the partners were liable for the debt of the partnership to the county did not make the county a secured creditor, with the result of making allowable against the partnership assets only so much of that debt as remained after deducting the amount paid by such sureties. Bankruptcy Act, §§1 (23), 57c. The above mentioned $108,000.00 having been paid after the partnership made a general assignment of its assets for the benefit of its creditors, the full amount of the debt of the partnership to the county, with interest, was allowable against the partnership estate,—to which is added any surplus remaining of the property of any partner after paying his individual debts—without deducting the sum of $108,000.00; the appellee being entitled to dividends upon the full amount of the claim allowed in his favor until from all sources he has received full payment of that claim, but no longer. Merrill v. National Bank of Jacksonville, 173 U. S. 131; Board of County Com'rs v. Hurley, 169 Fed. 92.

The petition is granted, and the cause is remanded for further proceedings not inconsistent with this opinion.

Petition granted.

No. 4737

J. W. Hampel et als., Trustees in Bankruptcy, etc., et als.,

versus

C. Minkwitz, as Treasurer of Fort Bend County, Texas

Judgment

Extract from the Minutes of March 25th, 1927

This cause came on to be heard on the petition of J. W. Hampel, et als., Trustees in Bankruptcy, etc., et als., to superintend and revise in certain respects as therein stated,

the proceedings of the District Court of the United States for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the said petition to superintend and revise the proceedings aforesaid be, and the same is hereby granted; and that said cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the respondent, C. Minkwitz, as Treasurer of Fort Bend County, Texas, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fols. 109-113] Petition for rehearing, covering five pages, filed April 13, 1927 omitted from this print. It was denied and nothing more by order April 15, 1927.

No. 4737

J. W. Hampel et als., Trustees in Bankruptcy, etc., et als.,

versus

C. Minkwitz, as Treasurer of Fort Bend County, Texas

Order Denying Rehearing

Extract from the Minutes of April 15th, 1927

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

In the United States Circuit Court of Appeals, Fifth Circuit

No. 4737

J. W. Hampel et al., Trustees in Bankruptcy, etc., et al., Petitioners,

vs.

C. Minkwitz, as Treasurer of Fort Bend County, Texas, et al., Respondents

Application for Stay of Mandate and Execution

Petition of Respondent and Order Recalling and Staying Mandate Until June 1st, 1927—Filed April 28th, 1927

Now comes C. Minkwitz, as treasurer of Fort Bend County, Texas, and T. B. Wessendorff, R. H. Darst, R. F. Ransom, J. W. Slavin and A. P. George, individually and as independent executor of the estate of T. W. Davis, deceased, respondents in the above cause and would show unto the court that on the 3rd day of December, 1925, the District Court of the United States for the Southern District of Texas entered its order confirming in all respects the decree made by the referee in bankruptcy December 5, 1924, allowing the claim of the respondent, C. Minkwitz, as treasurer of Fort Bend County, Texas, in the sum of $334,-

136.24, with interest thereon at the rate of 6% per annum, to the 9th day of July, 1923, against the individual estates of the bankrupts, J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, jointly and severally. That in due time a petition to superintend and revise the action of the Honorable District Court of the Unted States for the Southern District of Texas was presented to this court. That upon said petition this court on the 25th day of March, 1927, entered its order granting said petition and reversing the holding of the said Honorable District Court of the United States and determined that the said Honorable District Court of the United States erred in allowing the claim of the respondent against the individual estates of the bankrupts, J. H. P. Davis, R. E. L. Wessendorff and E. Foerster.

An application for rehearing, timely filed, was by this court on the 15th day of April, 1927, in all things overruled.

These respondents feeling aggrieved by the action of this court in so granting the petition and reversing the judgment of the said District Court of the United States is desirous of and will apply to the Supreme Court of the United States for writ of certiorari to review said order and judgment so made and entered by this court. Respondent would show that the amount in controversy is in excess of $300,000.00 and that the respondent, C. Minkwitz, as treasurer of Fort Bend County, Texas, is prosecuting this claim in his official capacity as treasurer of Fort Bend County, Texas, and for the benefit of said county and for the benefit of the other respondents herein who were sureties on the bond executed by the bankrupts. That respondent is willing, in the event this court shall so determine, to file such bond as is required by this court with such conditions as provided by law, in the event this court should require a bond.

Wherefore, respondents pray that an order be issued herein staying the issuance of the mandate of this court, the issuance of an execution and enforcement of the judgment entered by this court for a reasonable time to enable them to apply for and obtain a writ of certiorari from the Supreme Court of the United States and that in the event

a bond be required that the amount be fixed in the order granting the stay.

Respectfully submitted.

(Signed) W. N. Foster, Fred R. Switzer, Attorneys for C. Minkwitz, as Treasurer of Fort Bend County, Texas, et al.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4737

J. W. HAMPEL et als., Trustees in Bankruptcy, etc., et al., Petitioners,

versus

C. MINKWITZ, as Treasurer of Fort Bend County, Texas, Respondent

Order

Considering the foregoing petition, it is ordered that the mandate of this Court, issued to the District Court of the United States for the Southern District of Texas on the 27th day of April, A. D. 1927, be, and the same is hereby recalled and stayed until the 1st day of June, A. D. 1927, provided that the applicant give bond in the sum of five thousand ($5,000.00) to be approved by the undersigned, and with condition that if the respondent fail to make application for such writ within the period allotted therefor, or fail to obtain an order granting his application, or fail to make his plea good in the Supreme Court, he shall answer for all damages and costs which the petitioner may sustain by reason of the delay, said mandate to be issued at the expiration of the above stated time unless the application of the respondent for a writ of certiorari shall then have been submitted to the U. S. Supreme Court.

April 28th, 1927.

(Signed) Rufus E. Foster, U. S. Circuit Judge.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4737

J. W. HAMPEL et als., Trustees in Bankruptcy, etc., et al., Petitioners,

versus

C. MINKWITZ, as Treasurer of Fort Bend County, Texas, Respondent

BOND FOR STAY OF MANDATE—Filed May 9th, 1927

Know all men by these presents that we, Aileen E. Mitchell, as treasurer of Fort Bend County, Texas, successor to C. Minkwitz, as treasurer of Fort Bend County, Texas, as principal and American Bonding Company of Baltimore, as surety, are held and firmly bound unto J. W. Hampel, et als., Trustees in Bankruptcy, etc., and others, in the full and just sum of Five Thousand ($5,000.00) Dollars, to be paid unto the said J. W. Hampel, et als., Trustees in Bankruptcy, etc., and others, their successors and assigns, and their administrators and assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and firmly by these presents.

Sealed with our seals and dated this the 7th day of May, in the year of Our Lord One Thousand Nine Hundred and Twenty-seven. (Seal.)

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, State of Louisiana, in the above suit pending in the said United States Circuit Court of Appeals, wherein J. W. Hampel, et als., Trustees in Bankruptcy, etc., et al., were petitioners, and C. Minkwitz, as Treasurer of Fort Bend County, Texas, was respondent, a decree was rendered against the said C. Minkwitz, as Treasurer of Fort Bend County, Texas, and the said Aileen E. Mitchell successor to C. Minkwitz, as treasurer of Fort Bend County, Texas, has this the 28th day of April, 1927, obtained a stay of the mandate of the United States Circuit Court of Appeals

in the above entitled and numbered cause until the first day of June, A. D. 1927, to enable respondent to apply for and obtain a writ of certiorari from the Supreme Court of the United States to the United States Circuit Court of Appeals.

Now, therefore, the condition of this obligation is such that if the said Aileen E. Mitchell, as treasurer of Fort Bend County, Texas, she being the successor to C. Minkwitz, as treasurer of Fort Bend County, Texas, fails to make application for such writ of certiorari on or before the first day of June, 1927, or fails to obtain an order granting her application, or fails to make good her plea in the Supreme Court, she shall answer for all damages and costs which the said J. W. Hampel, et al., Trustees in bankruptcy, et al., may sustain by reason of the stay, otherwise this obligation shall be null and void.

(Signed) Aileen E. Mitchell, as Treasurer of Fort Bend County, Texas, Principal. American Bonding Company of Baltimore, Surety, by (Signed) Robt. Funkhouser. Robt. Funkhouser, Attorney-in-fact. (Seal.)

Approved May 9th, 1927. (Signed) Rufus E. Foster, U. S. Circuit Judge.

This power of attorney limits the act of those named therein to the bonds and undertakings specifically named therein, and they have no authority to bind the company except in the manner and to the extent therein stated.

Form L1419a-1500, 1-26-27. 119

Power of Attorney

American Bonding Company of Baltimore

Home Office: Baltimore, Maryland

Know all men by these presents:

That the American Bonding Company of Baltimore, by E. R. Nuttle President, and E. B. Bates Assistant Secretary, in pursuance of authority granted by Article VI, Sec-

tion 2, of the By-Laws of said Company, which reads as follows:

"The President, or First Vice-President, or Second Vice-President or any one of the Additional Vice-Presidents specially authorized so to do by the Board of Directors or by the Executive Committee, shall have power by and with the concurrence of the Secretary or any one of the Assistant Secretaries, to appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-Fact as the business of the company may require or to authorize any person or persons to execute on behalf of the Company, any bonds, recognizances, stipulations undertakings, deeds, releases of mortgages, contracts, agreements, and policies, and to affix the seal of the Company thereto."

does hereby nominate, constitute and appoint Jno. R. Young, Robt. Funkhouser and W. O. Woods, all of Houston, Texas, each its true and lawful agent and Attorney-in-Fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed, any and all bonds and undertakings. This power does not include Administration Bonds in Community Estates and bonds of Independent Executors.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

The said Assistant Secretary does hereby certify that the aforegoing is a true copy of Article VI, Section 2, of the By-Laws of said Company, and is now in force.

In witness whereof, the said President and Assistant Secretary have hereunto subscribed their names and affixed the Corporate Seal of the said American Bonding Company of Baltimore, this 9th day of April, A. D. 1927.

American Bonding Company of Baltimore, by
(Signed) E. R. Nuttle, Vice-President.

Attest: (Signed) E. B. Bates, Assistant Secretary.
(Seal.)

STATE OF MARYLAND,
City of Baltimore, ss:

On this 9th day of April, A. D. 1927, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came the above named President and Assistant Secretary, of the American Bonding Company of Baltimore, to me personally known to be the individuals and officers described in and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

(Signed) Lorana Mason, Notary Public. (Seal.)

SUPPLEMENTAL ORDER STAYING MANDATE PENDING APPLICATION FOR CERTIORARI—Filed May 16th, 1927

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4737

J. W. HAMPEL et als., Trustees in Bankruptcy, etc., et al., Petitioners,

versus

C. MINKWITZ, as Treasurer of Fort Bend County, Texas, et al., Respondents

Order

Further considering the petition for stay of mandate and execution in the above entitled and numbered cause

filed herein on April 28, 1927, it is ordered that the mandate of this court, issued to the District Court of the United States for the Southern District of Texas on the 27th day of April, A. D. 1927, be, and the same is hereby in all things recalled and stayed until the first day of June, A. D. 1927, provided that the applicants, or any one of them, give bond in the sum of Five Thousand Dollars ($5,000.00), to be approved by the undersigned, and with condition that if the respondents fail to make application for such writ within the period allotted therefor, or fail to obtain an order granting their application, or fail to make their plea good in the Supreme Court, they or he shall answer for all damages and costs which the petitioners may sustain by reason of the delay, said mandate to be issued at the expiration of the above stated time unless the application of respondents for a writ of certiorari shall then have been submitted to the United States Supreme Court.

(Signed) Rufus E. Foster, United States Circuit Judge.

May 16, 1927.

In the United States Circuit Court of Appeals, Fifth Circuit

No. 4737

J. W. Hampel et als., Trustees in Bankruptcy, etc., et al., Petitioners,

versus

C. Minkwitz, as Treasurer of Fort Bend County, Texas, et al., Respondent

Bond for Stay of Mandate—Filed May 16th, 1927

Know all men by these presents that we, T. B. Wessendorff, as principal, and the Metropolitan Casualty Insurance Co. of New York, 55 Fifth Avenue, as surety, are held and firmly bound unto J. W. Hampel, et als., Trustees in Bankruptcy, etc., and others, in the full and just sum of Five Thousand ($5,000.00) Dollars, to be paid unto the

said J. W. Hampel, et als, Trustees in Bankruptcy, etc., and others, their successors and assigns, and their administrators and assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and firmly by these presents.

Sealed with our seal and dated this 16th day of May, in the year of Our Lord One Thousand Nine Hundred and Twenty-seven.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, State of Louisiana, in the above suit pending in said United States Circuit Court of Appeals, wherein J. W. Hampel, et als, Trustees in Bankruptcy, etc., and others, were petitioners and C. Minkwitz as Treasurer of Fort Bend County, Texas, et al, were respondents, a decree was rendered granting the petition to superintend and revise and remanding the said cause, and T. B. Wessendorff, R. H. Darst, R. F. Ransom, J. W. Slavin, A. P. George, and A. P. George as executor of the estate of T. W. Davis, deceased have this 16th day of May, 1927, obtained a Stay of the Mandate of the United States Circuit Court of Appeals in the above entitled and numbered cause until the first day of June, 1927, to enable said respondents, or any of them, to apply for and obtain Writ of Certiorari from the Supreme Court of the United States to the United States Circuit Court of Appeals.

Now, therefore, the condition of this obligation is such that if the said T. B. Wessendorff, R. H. Darst, R. F. Ransom, J. W. Slavin, A. P. George, and A. P. George as executor of the estate of T. W. Davis, deceased, fail to make application for such Writ of Certiorari on or before the first day of June, 1927, or fail to obtain an order granting such application, or fail to make good their plea in the Supreme Court, he, the said T. B. Wessendorff, shall answer for all damages and costs which the said J. W. Hampel, et als., Trustees in Bankruptcy, etc., and others, may sustain by reason of the Stay; otherwise, this obligation shall be null and void.

(Signed) T. B. Wessendorff, Principal. The Metropolitan Casualty Insurance Co. of New York, by (Signed) E. R. Barrow, Attorney-in-Fact, Surety. (Seal.)

Approved May 16, 1927. (Signed) Rufus E. Foster, U. S. Circuit Judge.

APPLICATION OF AILEEN E. MITCHELL FOR PERMISSION TO PROSECUTE CAUSE IN PLACE OF C. MINKWITZ, DECEASED—Filed May 16th, 1927

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4737

J. W. HAMPEL et als., Trustees in Bankruptcy, etc., et al., Petitioners,

versus

C. MINKWITZ, as Treasurer of Fort Bend County, Texas, et al., Respondent

Application of Aileen E. Mitchell for permission to continue and prosecute this cause as treasurer of Fort Bend County, Texas, as successor of C. Minkwitz, deceased, former treasurer of Fort Bend County, Texas.

Now comes Aileen E. Mitchell of Fort Bend County, Texas, and says that C. Minkwitz, formerly Treasurer of Fort Bend County, Texas, and an original appellee as such in the above entitled and numbered cause, has died during its pendency.

That she, the said Aileen E. Mitchell, has succeeded the said C. Minkwitz, as the Treasurer of said county and has duly qualified as such and is now acting as such.

That there is therefore a substantial need for the present Treasurer of said county continuing and maintaining the cause and obtaining an adjudication of the questions involved.

She therefore prays for an Order authorizing her as successor of the said C. Minkwitz as Treasurer of Fort Bend County, to prosecute said cause as Treasurer of said county.

Aileen E. Mitchell, by (Signed) T. W. Gregory, Fred R. Switzer, Counsel.

I have examined the statements of fact contained in the above application and know of my own knowledge that they are truly and correctly stated therein.

(Signed) W. N. Foster.

Sworn to and subscribed before me at Houston, Texas, this — days of May, 1927. (Signed) E. L. McMullen, Notary Public, Harris County, Texas. (Seal.)

ORDER GRANTING APPLICATION OF AILEEN E. MITCHELL FOR PERMISSION TO CONTINUE AND PROSECUTE CAUSE AS TREASURER OF FORT BEND COUNTY, TEXAS, IN PLACE OF C. MINKWITZ, DECEASED—Filed May 16th, 1927

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4737

J. W. HAMPEL et als., Trustees in Bankruptcy, etc., et al., Petitioners,

versus

C. MINKWITZ, as Treasurer of Fort Bend County, Texas, et al., Respondent

Order

Considering the application of Aileen E. Mitchell for permission to continue and prosecute this cause as Treasurer of Fort Bend County, Texas, as successor of C. Minkwitz, deceased, former Treasurer of said County, said Application is granted and it is Ordered that the said Aileen E. Mitchell is hereby authorized as successor of said C. Minkwitz as Treasurer of Fort Bend County, Texas, to prosecute the above cause as Treasurer of said county and obtain an adjudication of the questions involved.

May 16, 1927.

(Signed) Rufus E. Foster, United States Circuit Judge.

Clerk's Certificate

United States of America:

United States Circuit Court of Appeals, Fifth *Index*

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 1 to 101 inclusive, preceding this certificate, comprise the printed records in the causes wherein J. W. Hampel, et als., Trustees in Bankruptcy etc., et als., are petitioners, and C. Minkwitz, as Treasurer of Fort Bend County, Texas, is respondent, No. 4737, and wherein J. W. Hampel, et als., Trustees in Bankruptcy etc., et als., are appellants, and C. Minkwitz, as Treasurer of Fort Bend County, Texas, et als., are appellees, No. 4768, respectively of the docket of said Court.

I further certify that the pages numbered from 102 to 129 inclusive, next preceding this certificate, contain full, true and complete copies of all pleadings, record entries and proceedings in cause No. 4737, and including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit in said cause, as full, true and complete as the originals of the same now remain in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 16th day of May, A. D. 1927.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 131] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8158)

FILED
MAY 26 1927
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

No. [redacted] 269

AILEEN E. MITCHELL (Successor of C. Miskewits, Former Treasurer of Fort Bend County, Texas), as Treasurer of Fort Bend County, Texas, et al., Petitioners,

vs.

J. W. HAMPEL, ET AL., Trustees of Rabbeducce, etc., et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.

AILEEN E. MITCHELL
(Successor of C. Miskewits, Former Treasurer of Fort Bend County, Texas), as Treasurer of Fort Bend County, Texas, et al., Above Mentioned Petitioners,
By T. W. GREGORY,
W. N. FOSTER,
FRED R. SWITZER,
Their Solicitors.

(63,720)

INDEX TO PETITION.

	Page
I. Preliminary statement	1
II. Summary and short statement of the matter involved.	2
A. Amount involved	2
B. Abbreviations used	2
C. The bonds involved	3
D. Proceedings before referee	4
E. Proceedings in the United States District Court.	5
F. Proceedings in the Circuit Court of Appeals	5
G. Errors of the Circuit Court of Appeals complained of by petitioners	7
III. Summary of general reasons relied on for allowance of writ	8
First. Decision of Circuit Court of Appeals in conflict with decisions of other circuits.	8
Second. Decision of Circuit Court of Appeals not supported by decisions of Supreme Court or any circuit court	8
Third. Decision of Circuit Court of Appeals on important questions of general law probably untenable and in conflict with weight of authority	8
Fourth. Decision of Circuit Court of Appeals on an important question of Federal law, which has not been and should be settled by Supreme Court	9
Fifth. Circuit Court of Appeals probably in conflict with applicable decisions of Supreme Court	9
Sixth. Circuit Court of Appeals has so far departed from accepted and usual course of judicial proceedings and sanctioned such a departure as to call for an exercise of revision by Supreme Court	9
Seventh. Decision of Circuit Court of Appeals in conflict with well-established American rule of law as distinguished from English rule	9
Affidavit and certificate of T. W. Gregory, solicitor for petitioners	10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1153

AILEEN E. MITCHELL (SUCCESSOR OF C. MINKWITZ, FORMER TREASURER OF FORT BEND COUNTY, TEXAS), AS TREASURER OF FORT BEND COUNTY, TEXAS, ET AL., PETITIONERS,

vs.

J. W. HAMPEL ET AL., TRUSTEES IN BANKRUPTCY, ETC., ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Supreme Court of the United States:

I.

Preliminary Statement.

Now come Aileen E. Mitchell (successor of C. Minkwitz, former Treasurer of Fort Bend County, Texas), as Treasurer of Fort Bend County, Texas, T. B. Wessendorff, R. H. Darst, R. F. Ransom, J. W. Slavin, A. P. George, and A. P. George, as executor of the estate of T. W. Davis, deceased, and petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, to review the decision of that court. Petitioners exhibit herewith the necessary certified copies of the printed transcript of the record filed in the circuit court of appeals, said transcript embracing also all of the proceedings in that court. Petitioners attach hereto and include in this petition a supporting brief.

The respondents are J. W. Hampel, George Hamman, and T. J. Holbrook, trustees for the bankrupt partnership of J. H. P. Davis & Company and the surviving partners of said firm, and I. R. Bryan and other creditors. The solicitors of record of respondents are Bryan, Dyess, Colgin & Suhr, and Bryan, Colgin, Suhr & Bering, all of Houston, Texas.

In support hereof petitioners represent:

II.

Summary and Short Statement of the Matters Involved.

A. *Amount Involved:*

The amount involved, without interest, is over $100,000 (Record, 7 and 22).

B. *Abbreviations Used:*

The Partnership—For J. H. P. Davis & Company, the partnership in bankruptcy.

The Surviving Partners—For J. H. P. Davis, R. E. L. Wessendorff, and E. Foerster, survivors of the partnership of J. H. P. Davis & Company, and likewise in bankruptcy.

The Sureties on Bonds Involved, not members of the partnership—For R. H. Darst, T. B. Wessendorff, A. P. George, T. W. Davis, Real F. Ransom, and J. W. Slavin.

The Trustees in Bankruptcy—For J. W. Hampel, George Hamman, and T. J. Holbrook, trustees in bankruptcy for J. H. P. Davis & Company and the surviving partners.

C. *The Bonds Involved:*

The partnership constituted an unincorporated bank and was county depository for the funds of Fort Bend County, Texas, and to secure the proper handling of these funds it gave the county two bonds, one for $300,000 and the other for $50,000. Both bonds were signed as follows:

"J. H. P. DAVIS & CO.,
By J. H. P. DAVIS,
President, as Principal.
E. FOERSTER,
R. E. L. WESSENDORFF,
J. H. P. DAVIS,
T. A. WESSENDORFF,
T. B. WESSENDORFF,
T. W. DAVIS,
R. H. DARST,
A. P. GEORGE,
REAL F. RANSOM,
J. W. SLAVIN,
As Sureties."

Both bonds stated that the partnership bound itself as principal and the other parties as sureties, and that they were bound "both jointly and severally"; the parties signing the bonds were the partnership, the three surviving partners, T. A. Wessendorff, now deceased, also one of the partnership, and six other persons not members of the partnership (Record, 28-34).

D. *Proceedings Before the Referee:*

The partnership and the three surviving partners were adjudged bankrupt. C. Minkwitz, as treasurer of Fort Bend County, and in its behalf, filed an amended claim before the referee in bankruptcy, charging that the partnership and the surviving partners were indebted to the county on the bonds in the sum of $334,136.24, with interest (Record, 21-34), and that claimant had an individual claim against the individual assets of the three surviving partners in addition to its claim against the partnership (Record, 27).

J. W. Slavin, A. P. George, T. W. Davis (now deceased and who appears herein through his executor, A. P. George), R. F. Ransom, R. H. Darst and T. B. Wessendorff (they being sureties on the bonds involved but not members of the partnership) appeared before the referee, showed that they were creditors of the partnership and presented their claims as such; they likewise charged that the county of Fort Bend was entitled to have its claim allowed against both the partnership and the surviving partners and that said claim should be so allowed and should inure to their benefit (Record, 51-57).

The trustees in bankruptcy contested the amended claim, asserting that there was no individual liability on the part of the surviving partners different or separate from their liability as members of the partnership (Record, 35-38) and that the claim should be allowed against the partnership only.

The referee ordered the claim allowed against the estate of the partnership and also against the individual estates of the surviving partners, jointly and severally (Record, page 58), and certified his action to the United States district judge (Record, 59).

E. *Proceedings in the United States District Court:*

On petition for review the district judge, on November 14, 1925, affirmed the order of the referee, holding that Fort Bend County was entitled to file double proof against the partnership assets and against the individual assets of the surviving partners and entered an order to that effect (Opinion, page 89; Order, page 91). A petition to superintend and revise was filed by respondents and perfected to the United States Circuit Court of Appeals for the Fifth Circuit (Record, pages 1-8 and pages 92-100).

F. *Proceedings in the Circuit Court of Appeals:*

On March 25, 1927, the circuit court of appeals granted the petition to superintend and revise, holding that the referee and the district court erred in allowing the debt to the county as a claim against the estates of the three surviving partners as individual debts of the partners, and remanded the case for fur-

ther proceedings (Record: Judgment, page 105; Opinion, pages 103-105). A motion for rehearing was filed by petitioners (Record, pages 107-111) and overruled by the court on April 15, 1927 (Record, page 112); petitioners filed an application for stay of mandate and execution for the purpose of applying to this Court for writ of certiorari (Record, pages 112-114). On April 28, 1927, one of the judges of the circuit court of appeals entered an order recalling and staying the mandate of that court until June 1, 1927, provided applicant gave the necessary bond (Record, 114); the bond was duly filed and approved as required by the last-mentioned order (Record, 115-119). On May 16, 1927, one of the judges of the circuit court of appeals entered a further order extending the one last mentioned so as to permit applicants, or any one of them, to give the bond required (Record, 118-119); a bond executed by one of petitioners was then duly filed and approved (Record, 119-121).

On the 16th day of May, 1927, Aileen E. Mitchell filed in the circuit court of appeals an application for permission to continue and prosecute this cause as treasurer of Fort Bend County, Texas, as successor of C. Minkwitz, deceased, former treasurer of said county, and showed to the satisfaction of the court that C. Minkwitz had died pending the litigation and that Aileen E. Mitchell had succeeded the said Minkwitz as treasurer of Fort Bend County, Texas, and had duly qualified and was acting as such (Record, 121-122). On the 16th day of May, 1927, the above application was granted by a judge of the circuit court of appeals (Record, 122).

G. *Errors of the Circuit Court of Appeals Complained of by Petitioners:*

The United States Circuit Court of Appeals for the Fifth Circuit erred:

1. In determining that the words "individual debts" used in the Bankruptcy Act, Section 5, Sub-section (*f*), mean only debts of a partner for which the partnership is not liable.

2. In determining that the words *individual debts* used in the Bankruptcy Act, Section 5, Sub-section (*f*), did not include the obligation undertaken by the individual partners in the bonds involved.

3. In reversing the judgment of the trial court and holding that the respondent, C. Minkwitz, as treasurer of Fort Bend County, was not entitled to have his claim allowed against the individual estates of the individual surviving partners (as well as against the partnership estate), to be paid out of the individual estates in preference to the claims of general creditors of the partnership.

NOTE.—Sub-sections (*f*) and (*g*) of Section 9589 of Revised Statutes of United States, relating to bankruptcy, are as follows:

> (*f*) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his *individual debts.* Should any surplus remain of the property of any partner after paying his individual debts, such surplus

shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

(*g*) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

III.

Summary of General Reasons Relied on for Allowance of the Writ.

First. The decision of the Circuit Court of Appeals for the Fifth Circuit is in conflict with the decisions of the Circuit Courts of Appeals for the Second, Third, Fourth, Sixth, Seventh and Ninth Circuits (See Brief attached).

Second. The decision of the Circuit Court of Appeals for the Fifth Circuit is not supported by the decisions of the Supreme Court or of any circuit court of appeals of any other circuit (See Brief attached).

Third. The decision of the Circuit Court of Appeals for the Fifth Circuit is on an important question of general law in a way probably untenable and in conflict with the weight of authority (See Brief attached).

Fourth. The decision of the Circuit Court of Appeals for the Fifth Circuit is on an important question of Federal law which has not been, but should be, settled by this Court (See Brief attached).

Fifth. The Circuit Court of Appeals for the Fifth Circuit has herein decided a Federal question in a way probably in conflict with the applicable decisions of this Court (See Brief attached).

Sixth. The Circuit Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure as to call for an exercise of this Court's power of supervision (See Brief attached).

Seventh. The decision of the Circuit Court of Appeals for the Fifth Circuit is in conflict with a well-established American rule of law as distinguished from the English rule (See Brief attached).

Respectfully submitted,

AILEEN E. MITCHELL
(*Successor of C. Minkwitz, Former Treasurer of Fort Bend County, Texas*), *as Treasurer of Fort Bend County, Texas, et al.,*
By T. W. GREGORY,
W. N. FOSTER,
FRED R. SWITZER,
Their Solicitors.

STATE OF TEXAS,
County of Harris:

I, T. W. Gregory, being duly sworn, do hereby say that I am one of the counsel for the petitioners, that I prepared the foregoing petition, and that the allegations thereof are true as I verily believe.

I also certify that in my opinion the petition is well founded and the case is one in which the prayer of the petition for certiorari should be granted.

T. W. GREGORY.

Subscribed and sworn to before me by T. W. Gregory this the 16th day of May, A. D. 1927.

[SEAL.] E. L. McMULLEN,
Notary Public in and for Harris County, Texas.

SUBJECT INDEX OF MATTER CONTAINED IN BRIEF.

Page

Concise statement of grounds on which jurisdiction of the Supreme Court is invoked..... 2

Concise statement of the case..... 4

Specification of assigned errors relied on..... 5

The argument..... 6

First Proposition:

When a creditor holds an obligation of a bankrupt firm upon which individual members of the partnership have, as joint makers, sureties or endorsers, made themselves individually liable, he is entitled to prove his claim both against the partnership estate and the individual estates..... 7

Authorities under first proposition..... 7

Second Proposition:

A creditor holding a joint and several obligation signed by members of the bankrupt firm, but not in the firm name, when the proof shows that it was given for the benefit of the firm, and the consideration therefor became a partnership asset, can prove his claim against both the firm estate and the estates of the individual signers..... 8

Authorities under second proposition..... 8

Third Proposition:

When a creditor holds an obligation of a bankrupt firm, signed only in the firm name, and the proof shows that the partners wrongfully converted the property of such creditor, he can prove two claims, one against the firm, based upon the obligation signed by it, and the other against the partners jointly and severally who so converted his property, as upon an implied contract (the tort being waived) to pay the value of the property so converted by them..... 9

Authorities under third proposition..... 9

Fourth Proposition:

The partnership members who signed the bonds must be regarded as principals whose liability is primary, in relation to the liability of the six strangers (not members of the partnership) who signed it as sureties; the relation will be determined from the lan-

Page

guage of the contract and the law will look to the essence rather than to the form of the language used and the name given to the transaction by the parties themselves. The use of the word "surety" does not necessarily indicate that the promise is collateral 10

Authorities under fourth proposition..... 10

Fifth Proposition:

A partner who individually joins in an obligation of his firm for its accommodation is not indirectly or secondarily, but is primarily, liable thereon, and the individual liability is not merged in that of the partnership 11

Authorities under fifth proposition..... 11

Sixth Proposition:

The Circuit Court of Appeals in holding that the words "individual debts" appearing in Subsection (*f*) of Section 5 of the Bankruptcy Act mean only debts of individual partners for which the partnership is not liable seeks by implication to add language after the words "individual debts" not found in the act itself, and is an attempt to amend and not to construe the law..... 12

Review of authorities..... 12

TABLE OF CASES CITED.

Bank v. Burton, 259 Fed. Rep., 218..... 8, 17

Buckingham v. Bank, 131 Fed. Rep., 192..... 8, 17

Chapman v. Bowen, 207 U. S., 88..... 7, 12

Davis v. Turner, 120 Fed. Rep., 665..... 9

Emory v. Canal Natl. Bank, Fed. Cas., No. 4446..... 8, 21

Ex Parte Bevan, 10 Ves. Jr., 107..... 26

Fourth Nat. Bank v. Mead, 216 Mass., 521..... 8

Francis v. McNeal, 228 U. S., 695..... 10, 11

Giltman v. Strong, 64 Pa. St., 242..... 11

In re Coe, 183 Fed. Rep., 745..... 9, 14, 21

In re Farnum, Fed. Cas., No. 4674..... 8, 19, 20

In re Jarmulowsky, 287 Fed. Rep., 706..... 9

In re McCoy, 150 Fed. Rep., 106..... 7, 12, 16, 28

In re Noyes Brothers, 127 Fed. Rep., 286..... 8

In re Thomas, Fed. Cas., No. 13886..... 9, 16, 20, 27

Page

Jasquet v. Thorn, 14 La., 506 19
Mock v. Stoddard, 177 Fed. Rep., 6 9
Mosier Case, 112 Fed. Rep., 139 27
Myers v. International Trust Co., Adv. Sheet; 71 Law Ed., 417 ..... 10, 20
Reynolds v. New York Trust Co., 188 Fed. Rep., 611 ..... 9, 14, 22, 25
Robinson v. Bank, 247 Fed. Rep., 667 ..... 8, 18
Schall v. Camors, 251 U. S., 239 ..... 10, 12
Schall v. Camors, 250 Fed. Rep., 6 ..... 10, 12, 22, 25
Stalick v. Slack, 219 Fed. Rep., 123 10
The Swallow, Fed. Cas., No. 13665 11
Winslow v. Wallace, 116 Ind., 317 16
Wysong v. Myer, 58 N. Y. App. Div., 422 11
Wysong v. Myer, 69 N. Y. Supp., 286 11
Section 240 (*a*) of Judicial Code 4
Subsections (*f*) and (*g*) of Section 9589 of the Revised Statutes 6
Collier on Bankruptcy, 12th Edition, 197 19
30 Cyc., 531 11
30 Cyc., 534 11
32 Cyc., 40 10
Note, 10 A. L. R., 851 ..... 25, 26
Note, 39 L. R. A. (N. S.), 391 ..... 19, 25, 26
R. C. L., 3, Section 49 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1153

AILEEN E. MITCHELL (SUCCESSOR OF C. MINKWITZ, FORMER TREASURER OF FORT BEND COUNTY, TEXAS), AS TREASURER OF FORT BEND COUNTY, TEXAS, ET AL., PETITIONERS,

vs.

J. W. HAMPEL ET AL., TRUSTEES IN BANKRUPTCY, ETC., ET AL., RESPONDENTS.

BRIEF FILED BY PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

There have been no official reports of the opinions rendered by the inferior courts in this case, but a copy of the opinion of the district court will be found on pages 89 to 90 of the record.

Concise Statement of the Grounds on Which Jurisdiction of the Supreme Court is Invoked.

The judgment of the Circuit Court of Appeals for the Fifth Circuit will be found on page 105 of the record, and the opinion, filed by the court on March 25, 1927, on pages 103-105 of the record.

The specific claims advanced by petitioners and the rulings made by the Circuit Court of Appeals for the Fifth Circuit complained of are shown by the following portion of their motion for a rehearing filed in the circuit court of appeals:

"First.

"The Honorable Circuit Court of Appeals erred in determining that the words 'individual debts' used in the Bankruptcy Act, Section 5, Sub-sections (*f*) and (*g*), meant only to describe debts of a partner for which the partnership is not liable.

"Second.

"The Honorable Circuit Court of Appeals erred in determining that the words 'individual debts' used in the Bankruptcy Act, Section 5, Sub-sections (*f*) and (*g*), did not include an obligation of the individual partner created by his executing a bond as joint maker with, or surety or endorser, for the partnership, for the reasons:

(1) "That such partner when so executing such bond with the partnership as to the obligee in said bond made the debt evidenced thereby his individual debt.

(2) "There is nothing in the statute to indicate that a distinction should be drawn between the individual debt for which the partnership was also liable and such individual debt for which the partnership was not liable.

"Third.

"The Honorable Circuit Court of Appeals erred in the application of the rule of the marshaling of assets as fixed by Bankruptcy Act, Section 5, Sub-sections (*f*) and (*g*), wherein the court said:

" 'That he who has a right to resort to two funds, to one of which alone another party may resort, must first exhaust the one to which the other party may not resort before coming upon the one to which both may resort.'

because the rule of marshaling fixed by the provision of Bankruptcy Act, Section 5, Sub-sections (*f*) and (*g*), directing the partnership dept to be paid out of the net proceeds of the partnership estate, and the debt of the individual partner to be paid out of the net proceeds of the individual estate of such partner, is applicable when the individual partner is bound by an express contract, even though the partnership may also be liable.

"Fourth.

"The Honorable Circuit Court of Appeals erred in reversing the judgment of the trial court allowing the claim of the respondent, C. Minkwitz, as treasurer of Fort Bend County, Texas, against the individual estate of the surviving members of the partnership who had

jointly executed the bond with the partnership, the trial court having decreed such claim should have priority of payment out of the individual estates over the claim of the general creditors of the partnership.

"Fifth.

"The Honorable Circuit Court of Appeals erred in determining that the respondent holding an obligation of a bankrupt partnership upon which the individual members thereof had as joint makers with, or as sureties, or endorsers for, made themselves individually liable, was not entitled to have his claim allowed against the partnership estate and also against the individual estates of such individual partners, same to be paid out of the individual estates to the exclusion of the general creditors of the partnership, because such holding is contrary to the weight of authority and is hostilely inconsistent with the rule announced in the adjudicated cases decided by the Second, Third, Fourth, Seventh and Ninth Courts of Appeal of the United States." (Record, 108 to 110.)

Jurisdiction of this Court is invoked in accordance with the provisions of Sec. 240 (*a*) of the Judicial Code as amended by Act of Congress of February 13, 1925, effective May 13, 1925.

Concise Statement of the Case.

This sufficiently appears in the petition for certiorari under the head of "Summary and Short Statement of the Matter Involved."

Specification of Assigned Errors Relied On.

Petitioners complain that the circuit court of appeals erred in the following respects:

1. In determining that the words "individual debts" used in the Bankruptcy Act, Section 5, Sub-section (*f*), mean only debts of a partner for which the partnership is not liable.

2. In determining that the words "individual debts" used in the Bankruptcy Act, Section 5, Sub-section (*f*), did not include the obligation undertaken by the individual partners in the bonds involved.

3. In reversing the judgment of the trial court and holding that the respondent, C. Minkwitz, as treasurer of Fort Bend County, was not entitled to have his claim allowed against the individual estates of the individual surviving partners (as well as against the partnership estate), to be paid out of the individual estates in preference to the claims of the general creditors of the partnership.

There is really but one point involved and that is whether or not the treasurer of Fort Bend County was entitled to have his claim allowed against the partnership estate and also against the individual estates of the surviving partners, to be paid out of the individual estates in preference to the claim of general creditors of the partnership. The contention of petitioners is that the treasurer was entitled to make this double proof, while the circuit court of appeals reached a contrary conclusion based upon its opinion that the words

"individual debts" appearing in Sub-sections (*f*) and (*g*) of Section 9589 of the Revised Statutes of 1918 relating to bankruptcy, referred solely to debts of one or more persons for which the partnership was not liable.

THE ARGUMENT.

The bonds involved appear in Record, 28 to 34; they are distinctly joint and several obligations signed by the partnership as principal and by the partners and six other persons as sureties. They constitute contracts between Fort Bend County and the partnership; they likewise constitute contracts between Fort Bend County and the individual signers.

The sections of the Bankruptcy Act involved are as follows:

> "(*f*) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his *individual debts*. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.
>
> "(*g*) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and in-

dividual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates." (Emphasizing type ours.)

The construction placed on the above sections by the circuit court of appeals would preclude double proof by any creditor, without regard to the nature of the obligation held by him.

In the interest of brevity petitioners will present their views under the following propositions with the authorities relied on grouped under each proposition.

First Proposition.

When a creditor holds an obligation of a bankrupt firm upon which individual members of the partnership have, as joint makers, sureties or endorsers, made themselves individually liable, he is entitled to prove his claim both against the partnership estate and the individual estates.

Authorities.

The above proposition has been specifically sustained in decisions of three different circuit courts of appeals in the following cases:

In re McCoy, 150 Fed. Rep., 106 (C. C. A., Seventh Circuit). This case reached the Supreme Court and is reported as *Chapman vs. Bowen*, 207 U. S., 88. The court dismissed the appeal, but Chief Justice Fuller said: "The decision below proceeded on well-settled principles of general law, broad enough to sustain it

without reference to provisions of the Bankruptcy Act."

Bank of Reidsville vs. Burton, 259 Fed. Rep., 218 (C. C. A., Fourth Circuit).

Buckingham vs. Bank, 131 Fed. Rep., 192 (C. C. A., Sixth Circuit).

In the case of *In re Noyes Brothers*, 127 Fed. Rep., 286, the First Circuit Court of Appeals held it was proper to make double proof "where there were separate and distinct contracts of the firm and partners." The bonds under consideration constituted contracts between the county and the partnership and likewise contracts between the county and the individual signers.

To the above the following authorities are added:

In re Farnum, Fed Cas. No. 4674.

Emory vs. Canal National Bank, Fed. Cas. No. 4446.

Fourth National Bank vs. Mead, 216 Mass., 521.

Second Proposition.

A creditor holding a joint and several obligation signed by members of the bankrupt firm, but not in the firm name, when the proof shows that it was given for the benefit of the firm, and the consideration therefor became a partnership asset, can prove his claim against both the firm estate and the estates of the individual signers.

Authorities.

The above proposition permitting double proof under conditions stated in this proposition was recognized:

Robinson vs. Seaboard National Bank, 247 Fed. Rep., 667 (C. C. A., Third Circuit).

The same case on rehearing, 247 Fed. Rep., 1007.

Davis vs. Turner, 120 Fed. Rep., 605 (C. C. A., Fourth Circuit).

In re Jarmulowsky, 287 Fed. Rep., 706 C. C. A., Eighth Circuit).

Mock vs. Stoddard, 177 Fed. Rep., 6 (C. C. A., Ninth Circuit).

In re Thomas, Fed. Cas. No. 13886.

Third Proposition.

When a creditor holds an obligation of a bankrupt firm, signed only in the firm name, and the proof shows that the partners wrongfully converted the property of such creditor, he can prove two claims, one against the firm, based upon the obligation signed by it, and the other against the partners jointly and severally who so converted his property, as upon an implied contract (the tort being waived) to pay the value of the property so converted by them.

Authorities.

Reynolds vs. New York Trust Co., 188 Fed. Rep., 611 (C. C. A., First Circuit).

In re Coe, 183 Fed. Rep., 745 (C. C. A., Second Circuit).

The above authorities sustained double proof under conditions stated in this proposition.

The following authorities are cited to sustain the general principles involved in First, Second, and Third Propositions:

Myers vs. International Trust Co., 71 Law. Ed., 417; (*U. S. Sup. Court Adv. Opin.*, March 15, 1927).

Schall vs. Camors, 251 U. S., 239.

Francis vs. McNeal, 228 U. S., 695.

Schall vs. Camors, 250 Fed. Rep. 6 (C. C. A., Fifth Circuit).

Stalick vs. Slack, 219 Fed. Rep., 123 (C. C. A., Eighth Circuit).

Collier on Bankruptcy, 12th Ed., 197.

Fourth Proposition.

The partnership members who signed the bonds must be regarded as principals whose liability is primary, in relation to the liability of the six strangers (not members of the partnership) who signed it as sureties; the relation will be determined from the language of the contract and the law will look to the essence rather than to the form of the language used and the name given to the transaction by the parties themselves. The use of the word "surety" does not necessarily indicate that the promise is collateral.

Authorities.

Opinion of the District Judge in this case (Rec., 89-90).

32 *Cyc.*, 40.

Jasquet vs. Thorn, 14 La., 506.

Wysong vs. Myer, 58 N. Y. App. Div., 422.
69 N. Y. Supp., 286.
Giltnav vs. Strong, 64 Pa. St., 242.

Fifth Proposition.

A partner who individually joins in an obligation of his firm for its accommodation is not indirectly or secondarily, but is primarily liable thereon, and the individual liability is not merged in that of the partnership.

Authorities.

30 *Cyc.*, 531.
The Swallow, Fed. Cas. 13665.

In *Cyc.*, 534, it was said:

> "It is competent for the members of a firm, or any of them, to bind themselves severally as well as jointly for a firm debt by an agreement to that effect."

In *Francis vs. McNeal*, 228 U. S., 695, it was said:

> "The nature of the liability (of the signers on an obligation) is determined by the common law, not by the possible intervention of the bankruptcy act."

And it was said in the opinion of District Judge Hutcheson in the court below, in referring to the bonds:

> "The substance and not the form is the desideratum in a transaction of this kind, and that substance here is that this partnership as a partnership signed the obligation; the partners

> as individuals signed the obligation and as between the creditor and them, the partnership and each individual are jointly and severally liable for the whole amount." (Tr., 89).

The bonds under consideration constitute contracts of the individual members of the firm of J. H. P. Davis & Company, as well as contracts of the firm as a partnership, and the debt which arose in favor of Fort Bend County through the default of the firm under the bonds is the debt of the individual members of the firm.

Sixth Proposition.

The Circuit Court of Appeals, in holding that the words "individual debts" appearing in Sub-section (*f*) of Section 5 of the Bankruptcy Act mean *only debts of individual partners for which the partnership is not liable*, seeks by implication to add language after the words "individual debts" not found in the act itself, and is an attempt to amend and not to construe the law.

Review of Authorities.

This court seems to have dealt with the subject only twice, the first time in the case of *Chapman vs. Bowen*, 207 U. S., 88, and the second time in *Schall vs. Camors*, 251 U. S. 239. The first mentioned case was disposed of under the title of *In re McCoy*, 150 Fed. Rep., 106, and in the lower court Judge Grosscup having held that a creditor holding a note signed by the firm of A. McCoy & Company, and also by the individual members of the firm, could prove his claim against both

the firm estate and the individual estates, receiving dividends from the joint estate as a partnership creditor, and from the separate estates of the partners on their contract as individual creditors (a decision which will be reviewed hereafter), the case reached the Supreme Court on appeal. This Court, while dismissing the appeal because not within the provisions of the then existing statute, took occasion to approve the judgment of the court below, through Chief Justice Fuller, in the following language:

> "The decision below proceeded on well settled principles of general law, broad enough to sustain it without reference to provisions of the Bankruptcy Act."

In *Schall vs. Camors* (250 Fed., 6) the Circuit Court of Appeals for the Fifth Circuit had under consideration the question as to whether a claim, in its nature a tort, arising out of a partnership transaction may be proved against the individual partners where the claim has been filed and allowed as a claim in contract against the partnership estate. It was said by Judge Grubb that the case presented involved two questions, (*a*) whether a claim in tort is provable at all under Section 63 of the Bankruptcy Act, and (*b*) whether, in case of a partnership transaction it may be proved doubly—against the estate of the partners and that of the partnership. He found it unnecessary to decide the first question but considered the second, and said:

> "If the partners had by separate contracts of guaranty obligated themselves to the claimants, such separate contracts would have af-

> forded a basis for a claim against their individual estates. So, if it had been shown that their individual estates had been enriched by the transaction complained of, or that they had been guilty of a separate and personal delinquency from that of the partnership, an individual obligation to make restitution to the injured claimant might have been implied."

He further said that in the absence of a separate individual obligation or a showing of benefit moving to the partners individually from the transaction that the court could see no reason for sustaining double proof on claims in favor of the implied obligation and that it would be contrary to the policy of the law for a firm creditor to be permitted to place himself on a parity with individual creditors of the partners as to his individual assets, thereby circumventing (so the court said) the equitable distribution of partnership assets among firm and individual creditors. He said that the question of double proof had been answered differently in the First and Second Circuits, citing *Reynolds vs. New York Trust Company* as supporting his opinion, and *In re Coe as contra.*

This decision was affirmed by the Supreme Court in 251 U. S., 239, and settles the question that claims based upon a mere tort are not provable. But it was further said:

> "Where the tortious act constitutes at the same time a breach of contract, a different question may be raised, with which we have no present concern; and where, by means of a tort, the tort-feasor obtains something of value for which

> an equivalent price ought to be paid, even if the tort as such be forgiven, there may be a provable claim *quasi ex contractu*."

The opinion points out that petitioners were insisting that the individual partners were responsible for frauds perpetrated as upon an implied contract, and then said:

> "But as the basis of a liability of this character is the unjust enrichment of the debtor, and as the facts show that no benefit accrued to the individuals as a result of the frauds beyond that which accrued to the firm, the logical result of the argument is that out of one enrichment there may arise three separate and independent indebtednesses." * * *
>
> "And since, in this case, the tort was done in the course of the partnership business, for the benefit of the firm and *without benefit to the partners as individuals*, no legal or equitable claim as against the individuals that might be deemed to arise out of it, by waiver of tort or otherwise, can displace the equities of the creditors, recognized in the Bankruptcy Act, and put petitioners in a position of equality with others who actually were creditors of the individual partners, and of preference over other firm creditors." (Emphasizing type ours.)

Justice Pitney's opinion, it seems to us, strongly suggests that, had there been an enrichment of the individual partners, separate and apart from the enrichment of the firm, a creditor, waiving the tort, might have proved his claim as upon an implied contract

against the individual members of the firm. If the court had had under consideration an express written contract, such as the bonds held by Fort Bend County in this case, evidencing a contract of the firm and also a contract of the individual members, it seems clear to us that, in the view of Justice Pitney, double proof would have been permissible.

We have stated that most of the circuit courts of appeal allow double proof, thereby construing the words "individual debts," as used in the statute (Sec. 5, Subdivision *f*) to mean debts of the firm members for which the partnership also is liable. We shall notice a number of these decisions.

In the case of *In re McCoy*, 150 Fed. Rep., 106, the Seventh Circuit Court of Appeals had under consideration a claim offered by a creditor based upon a note signed by the bankrupt firm of A. McCoy & Company, and also Alfred McCoy and Thomas McCoy, the individual members of the firm, the proceeds of the transaction going into the partnership business. It was held by the court (Judges Grosscup, Baker and Seaman) that the claim was provable against both the firm estate and the individual estates. The court quoted with approval from *Winslow vs. Wallace*, 116 Ind., 317, and from *In re Thomas*, Federal case No. 13886, both of which authorities sustain the theory of double proof in the marshaling of assets. Judge Grosscup, writing the opinion, said, that in England the old rule was that in administering the bankrupt laws of that country double proof against the partnership estate and the individual estates of the partners

was not allowed, "but," said the court, "this rule has not been followed in this country (citing authorities), and there is nothing in the bankruptcy act showing that this English rule was intended to be embodied in our act. Indeed, it is doubtful if the old rule is now in force in England."

In *Bank of Reidsville vs. Burton*, 259 Fed. Rep., 218, the Circuit Court of Appeals for the Fourth Circuit had under consideration notes signed by the firm and by the members thereof. Proof was allowed as against both the firm assets and the estates of the individual partners. The court used the following language:

> "That every creditor who holds a note of a bankrupt firm upon which an individual member has, as joint maker, surety, or endorser, made himself individually liable, is entitled to prove his claim both against the partnership and the individual estates is too well settled for discussion."

In *Buckingham vs. Bank*, 131 Fed. Rep., 192, the Circuit Court of Appeals of the Sixth Circuit had under consideration notes of a bankrupt partnership signed in the firm (Estes & Company) name and endorsed by the individual partners. The notes were presented as claims against the individual property of Estes, and it does not appear that they were sought to be proved against the partnership. It was held that the creditors holding the said notes could prove their claims at their election against the individual estate of Estes. The court (Judges Lurton, Severens and Richards) said:

> "Doubtless the notes executed by the firm and endorsed by Estes were firm debts, as well as individual debts of Estes. But the holders had the right, if they preferred, to present them as claims against Estes individually."

In *Robinson vs. Seaboard National Bank* (*In re Kuhn & Co.*), 247 Fed. Rep., 667, the Circuit Court of Appeals for the Third Circuit had under consideration claims based upon joint and several obligations of the members of the partnership, signed in their individual names, but without the signature of the firm. The proof showed that the proceeds of the notes were borrowed for, and were used by, the partnership for the firm's use and benefit and that it was the practice of the firm to borrow money on the individual notes of its members. It was held that the claims were provable against both the partnership estate and the individual estates of the partners.

The opinion by Circuit Judge Buffington is a clear, though concise, discussion of the law. Language of the referee was quoted with approval, as follows:

> "When the partners jointly agreed to pay (this being a firm transaction) they bound the firm; and when they severally agreed to pay, they bound themselves as individuals. It is not apparent why this joint or firm obligation and the several or individual obligations should differ in principle or legal effect from that where the firm executed the obligation and the individuals endorsed it." * * *

The court then added:

> "This is not a case of double proof on a single contract, but of single proof on two separate contracts. The referee and the court below enforced the two distinct contract obligations, embodied in the one note by enforcing each contract. Those contracts were cumulative, and not restrictively selective." (247 Fed. Rep., 668-9.)

On rehearing the court said the question was, should the claimants have been permitted to make double proof of their claim.

> "And on this point we continue to believe that the evidence before us warrants the application of the American rule. We shall not discuss this disputed question. Those who wish to pursue it may be referred to *Re Farnum*, Federal case No. 4674, also the note in 39 L. R. A. (N. S.) 391, and to 3 R. C. L., Sec. 49. But we do not assent to the conclusion stated in 3 R. C. L. that double proof is only to be allowed 'where the double claim is based upon the joint obligation of the firm and also an individual obligation or undertaking of the individual partner,' if this statement means that the 'independent obligation or undertaking of the individual partner' must be based on a separate writing (*e. g.*, an endorsement), or of a separate oral contract. We can see no sufficient reason for such a requirement. In our opinion a partnership obligation and the separate obligation of the individual partners may (as in the pending case) be contained in the face of the same instrument. If the evidence shows that the firm as such and the individual

> partners as such have bound themselves by the same act, the result is that three (or more) contracts have been entered into at the same time and by the same transaction. And in that event, as in any other case of a joint and several obligation, each of the contracts thus entered into should be followed by its appropriate consequence. Hence it was proved that each 'joint' contract was a firm contract, while the 'several' contracts, of course, bound the makers individually." (247 Fed. Rep., 1007-9.)

This decision, seemingly, was approved by the United States Supreme Court in the very recent case of *Myers vs. International Trust Company* (Advance Opinions, 71 Law Ed., page 418), in an opinion by Justice Sanford. The court quoted from a Massachusetts case, saying:

> "The defendants 'were none the less endorsers and none the less liable as such, because they were also liable as members of the firm which made the note,' "

and cited the Robinson case, with other cases, in support of the proposition.

In re Thomas (Federal case No. 13886) a note was signed by the members of the partnership, but not by the firm name, but it was shown that the note was given for the use and benefit of the firm. It was held that a holder of the note could prove the same against the firm estate, without surrender of security against the separate property of a member of the firm.

In re Farnum, Federal case No. 4674, Judge Sprague (District of Massachusetts), had under consideration

a draft drawn by the firm and endorsed by one partner, and it was held that the holder of such draft was entitled to dividends from the joint estate of the firm and from the separate estates of the endorsing partners.

While the last two cases cited are decisions of district courts, they contain valuable discussions bearing upon the question of permitting double proof under our bankruptcy laws, and, together with *Emory vs. Canal National Bank* (Federal case No. 4446), are in reality the leading cases, and are cited by nearly all of the late cases and regarded as establishing the American rule in contradistinction to the English rule. It may be mentioned, in passing, that the late cases allowing double proof under the bankruptcy act of 1898 cite these three cases with approval, it being pointed out in several of them that the reasoning in those cases is as applicable to the present law as to the earlier bankruptcy acts.

The opinion in *Emory vs. Bank* (*supra*), was written by Circuit Justice Clifford, and the decision is that a creditor holding commercial paper signed by a firm (in bankruptcy) and endorsed by an individual member of the firm, also bankrupt, may prove his debt against both estates and share in the dividends of each.

In the case of *Coe* (183 Fed. Rep., 745), the Circuit Court of Appeals for the Second Circuit had under consideration acceptances signed by Cadenas & Coe, a bankrupt firm.

These acceptances showed that property received by the firm was owned by the creditors, the firm merely

holding as bailee. The firm sold the property, collected the price and converted it to its own use and then failed.

One member of the firm offered a composition of 20 per cent in bankruptcy for himself and the firm, which was accepted; the creditor then made proof of his claim as against the other individual bankrupt, Coe. It was held that the conversion of the property by the firm made its members jointly and severally liable as tort-feasors and it was said:

> "The bank could prove two claims, one against the firm—*i. e.*, the partners jointly on the acceptances—and the other against the partners jointly and severally upon an implied contract (the tort being waived) to repay money of the bank wrongfully converted by them. The doctrine of election between inconsistent remedies on the same claim has no application."

The case of *Reynolds vs. New York Trust Company*, 188 Fed. Rep., 611, as heretofore indicated, was cited by the Circuit Court of Appeals for the Fifth Circuit in *Schall vs. Camors* as supporting that decision and as in conflict with the Coe case, above reviewed. The decision in the Reynolds case supports the decision by this Court in *Schall vs. Camors*, but we think it is clear that it is not in conflict with the Coe case, or any of the other cases which authorize double proof—that is, proof against the partnership estate and the individual estates of the partnership members, when based upon distinct express contracts of the firm and of the co-partners, and, therefore, does not support the de-

cision of the circuit court of appeals in the instant case, because the bonds under consideration here constitute express contracts both of the bankrupt firm and of its individual members. The Reynolds case is, perhaps, in conflict with the Coe case, wherein double proof was allowed based upon a partnership contract and an implied promise to pay for goods converted, the tort having been waived.

In the Reynolds case the bankrupt firm of E. H. Gay & Company came into possession of bonds belonging to the New York Trust Company, which bonds, under the agreement, were to be delivered to the Trust Company. Gay & Company, without authority of the Trust Company, pledged the bonds for loan obligations for the benefit of the firm. The proof by stipulation showed that no attempt was made by the Trust Company, a creditor, to show that the unauthorized pledge of the bonds was the individual act of Gay. The Trust Company filed its claim against both the partnership of Gay & Company and E. H. Gay individually. The claim against both estates was allowed. An appeal was taken by the trustee to the allowance of the claim against the individual estate. On this state of facts the Circuit Court of Appeals of the First Circuit reversed the lower court, holding that the claim as presented was not provable against the individual estate of E. H. Gay.

The court mentioned that the claim as against the individual estate of E. H. Gay was based solely upon the theory of an implied contract arising from the conversion of the bonds by Gay & Company in the

course of the firm business, and called attention to the fact that the proof was that no attempt had been made to show that the unauthorized pledge was the individual act of E. H. Gay, and said that it did not appear that E. H. Gay individually received benefit from the transaction. The court mentioned that it was contended by the Trust Company that the conversion was in course of firm business and that the partners thereby became jointly and severally liable in tort for the conversion, and that upon a waiver of tort there arose implied contracts of both the firm and of the individual partners to pay the value of the bonds converted to the use of the firm, following which the court used this language:

> "Where there are separate and distinct express contracts of the firm and of a co-partner to pay a debt contracted by the firm, the right to prove against both estates may be conceded. If one dealing with a firm procures also the individual undertaking of a partner to answer for the firm debt, there are substantial reasons for permitting him to resort to both estates." (Citing McCoy.)
>
> "The additional several contract of a partner is not implied from the firm transaction, but must be created by a distinct act of the co-partner."

It seems clear to us from a careful reading of the Reynolds case that the decision disallowing the claim of the creditor as against E. H. Gay individually is based upon the fact that the proof showed a conversion by the firm in the course of the business of the firm, and that no actual participation of E. H. Gay was

shown, or that his individual estate benefited therefrom (188 Fed. Rep., 611).

We respectfully submit that the Reynolds case, when considered in connection with an express contract obligation, the writing indicating a contract both of the firm and the individual members, is not in conflict with the cases of the other circuit courts of appeals allowing double proof. Indeed, the decision cites, with seeming approval, the McCoy case which is, perhaps, the leading authority allowing double proof, and in this connection it will be remembered that in the McCoy case the notes were signed in the firm name and also by the individual members of the firm, just as here the bonds were signed by Davis & Company and the individual members of said firm.

As we view the decisions it seems to us that this Court stands alone in disallowing double proof where a creditor holds an express obligation both of the firm and its members. Again we mention that the bonds, in terms, are joint and several obligations of the signers.

We desire to call the court's attention to the editorial note on, and annotation of, the case of *Schall vs. Camors* (250 Fed. Rep., 6; 162 C. C. A., 178), as found in 10 A. L. R., 851, *et seq.*, and we also direct the attention of the court to the editorial note and annotation following the reported decision in the case of *Reynolds vs New York Trust Company* (188 Fed. Rep., 611) as found in 39 L. R. A. (N. S.), 391. In both of said notes the question of allowance of double proof of a claim against the estate of a firm and the estate of individual partners is discussed at length, with a review of the decisions bearing upon such question. A good many

of the decisions that we have attempted to review in these remarks are discussed in said notes and we shall not attempt to follow in detail the editor's comments. However, we do desire to call attention to several matters covered by the notes, and several statements made therein.

It will be noted at once that the English rule and the American rule on the subject are different. The English practice, crystallized into a rule at an early date, is that joint and several creditors could not resort to both estates. The rule as stated was probably the result of *Ex parte Rowlandson*, which was decided in 1735 and has become a rule of property in England, so much so that later decisions, while expressing dissatisfaction with the rule, have adhered to it. In *Ex parte Bevan*, 10 Ves. Jr., 107 (cited in the editorial notes referred to), Lord Eldon said that he had never been able to understand why a creditor having a joint and several security should not go against both estates, but that it was settled otherwise upon rules not very intelligible. (39 L. R. A., 393.)

The editorial writer of the notes referred to recognized an American rule, as contra-distinguished from the English rule, the American rule, allowing double proof, such as we are contending, should be allowed in the instant case. In the note found at 10 A. L. R., 851, it is said:

> "It seems to be settled, not only under State insolvency laws, but under the Bankruptcy Acts in England and America, that proof cannot be made against both the partnership and individual estate merely because of the partnership

relation, *but such proof may be made if the partnership and the individual are jointly and severally liable upon the obligation, or if there is an individual liability of both partnership and partner for the same debt.*" (Emphasizing type ours.)

The case of *Re Thomas* (Federal case No. 13886) is cited by most of the decisions allowing double proof and the language of the court has been frequently quoted with approval; a part we now quote for the convenience of this Court:

> "The scope of these decisions is that, when an individual member of a firm, as such, becomes surety upon or indorses an obligation of the firm, he thereby gives what is in the nature of security upon his separate estate to the firm creditor; and by reason of the individual liability, superadded to the joint obligation, he places the firm creditor in a position where he can go against the individual as well as the joint estate. Thus it results that, without the indorsement or individual signature of one of the firm, the firm creditor would have no right to claim against the individual assets until individual creditors had been first satisfied. But, holding the individual indorsement or signature, the firm creditor may, in the first instance, prove against the separate as well as the joint estate."

The writer of the note in 10 A. L. R., 855, refers to the *Mosier case,* 112 Fed. Rep., 138, saying:

> "*Re Mosier* rules that mere joint and several liability on firm paper does not warrant proof against both estates, but the later cases seem to

have settled the question in accordance with *Robinson vs. Seaboard National Bank* (reported herewith), *ante.*, 842, in favor of such right. It was so held in *Re McCoy*, 80 C. C. A., 60, *et seq.*"

In the light of the decisions reviewed herein, and reviewed with far greater ability in the notes found in 10 A. L. R. and 39 L. R. A. (N. S.), referred to, it seems to us clear that this Court is out of harmony with the other circuit courts of appeal on the question under consideration. All of the other circuit courts that have spoken on the question, so far as we are able to find, allow double proof, thereby interpreting the language "*individual debts*," as found in the marshaling statute, to mean debts of individual members of a firm, for which the firm is also obligated, whereas the circuit court of appeals in the instant case has held the words "*individual debts*" to mean debts of the partnership members only, and for which the firm is not liable, and so construing said words has declined to allow double proof. So far as the United States Supreme Court has touched upon the question at all its action is in harmony with the other circuit courts, rather than with the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

T. W. GREGORY,
FRED R. SWITZER,
W. N. FOSTER,
Solicitors for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 269

AILEEN E. MITCHELL (SUCCESSOR OF C. MINKWITZ, FORMER TREASURER OF FORT BEND COUNTY, TEXAS), AS TREASURER OF FORT BEND COUNTY, TEXAS, ET AL.,
PETITIONERS,

vs.

J. W. HAMPEL, ET AL., TRUSTEES IN BANKRUPTCY, ETC., ET AL., RESPONDENTS.

BRIEF OF PETITIONERS.

T. W. GREGORY,
W. N. FOSTER,
FRED R. SWITZER,
Attorneys for Petitioners,
Aileen E. Mitchell, etc., et al.

SUBJECT INDEX OF MATTER CONTAINED IN BRIEF

PAGE

Statement of grounds on which jurisdiction of the Supreme Court is invoked 1- 4
Concise statement of the case 4- 8
A. Amount involved 4
B. Abbreviations used 4- 5
C. The obligation and bonds involved 5- 6
D. Proceedings before the referee 6- 7
E. Proceedings in the United States District Court 7
F. Proceedings in the Ciruit Court of Appeals 7- 8
Specifications of assigned errors relied on 8- 9
The argument 9-29

First Proposition:
When a creditor holds an obligation of a bankrupt firm upon which individual members of the partnership have, as joint makers, sureties or endorsers, made themselves individually liable, he is entitled to prove his claim both against the partnership estate and the individual estates 12
Authorities under First Proposition 12-13

Seond Proposition:
A creditor holding a joint and several obligation signed by members of the bankrupt firm, but not in the firm name, when the proof shows that it was given for the benefit of the firm, and the consideration therefor became a partnership asset, can prove his claim against both the firm estate and the estates of the individual signers 13
Authorities under Second Proposition 13

Third Proposition:
When a creditor holds an obligation of a bank-

PAGE

rupt firm, signed only in the firm name, and the proof shows that the partners wrongfully converted the property of such creditor, he can prove two claims, one against the firm, based upon the obligation signed by it, and the other against the partners jointly and severally who so converted his property, as upon an implied contract (the tort being waived) to pay the value of the property so converted by them 14

Authorities under Third Proposition 14

Fourth Proposition:

The partnership members who signed the bonds must be regarded as principals whose liability is primary, in relation to the liability of the six strangers (not members of the partnership) who signed it as sureties; the relation will be determined from the language of the contract and the law will look to the essence rather than to the form of the language used and the name given to the transaction by the parties themselves. The use of the word "surety" does not necessarily indicate that the promise is collateral 14-15

Authorities under Fourth Proposition 15

Fifth Proposition:

A partner who individually joins in an obligation of his firm for its accommodation is not indirectly or secondarily, but is primarily liable thereon, and the individual liability is not merged in that of the partnership 15

Authorities under Fifth Proposition 15-16

Sixth Proposition:

The Circuit Court of Appeals, in holding that the words "individual debts" appearing in Sub-section (f) of Section 5 of the Bankruptcy Act, mean *only debts of individual*

PAGE

partners for which the partnership is not liable, seeks by implication to add language after the words "individual debts" not found in the Act itself, and is an attempt to amend and not to construe the law 16
Review of Authorities 16-29

CASES AND AUTHORITIES CITED

Bank of Reidsville v. Burton, 259 Fed. Rep. 218 ..... 13, 21
Buckingham v. Bank, 131 Fed. Rep. 192 ..... 13, 21
Chapman v. Bowen, 207 U. S. 88 ..... 12, 16
Davis v. Turner, 120 Fed. Rep. 605 13
Emery v. Canal National Bank, Fed. Cas. No. 4446 ..... 13, 24
Ex Parte Bevan, 10 Ves. Jr., 107 28
Ex Parte Rowlandson, 3 P. Wms., 405 28
Fourth National Bank v. Mead, 216 Mass., 521 13
Francis v. McNeal, 228 U. S. 695 ..... 14, 15
Gasquet v. Thorn, 14 La., 506 15
Giltinan v. Strong, 64 Pa. St., 242 15
Globe Indemnity Co. v. Keeble, 20 Fed. Rep. (2nd Ser.), 85 14
In re Coe, 183 Fed. Rep. 745 ..... 14, 18, 24
In re Farnum, Fed. Cas. No. 4674 ..... 13, 24
In re Jarmulowsky, 287 Fed. Rep. 706 13
In re Kardos, 17 Fed. Rep. (2nd Ser.), 707 ..... 13, 25
In re McCoy, 150 Fed. Rep., 106 ..... 12, 17, 20
In re Thomas, Fed. Cas. No. 13886 ..... 13, 20, 23
Mock v. Stoddard, 177 Fed. Rep. 611 13
Myers v. International Trust Co., 273 U. S. 382 ..... 12, 14, 17, 20
Reynolds v. New York Trust Co., 188 Fed. Rep. 613 ..... 13, 18, 20
Robinson v. Seaboard Natl. Bank, 247 Fed. Rep. 667 ..... 13, 22
Schall v. Camors, 251 U. S. 239 ..... 14, 17, 18
Schall v. Camors, 250 Fed. Rep. 6 ..... 14, 17, 18
The Swallow, Fed. Cas. 13665 15

PAGE

Winslow v. Wallace, 116 Ind. 317 20
Wysong v. Meyer, 58 N. Y. App. Div., 422 15
Collier on Bankruptcy, 13th Edition, 272-273 14
30 Cyc. 531 15
30 Cyc. 534 15
32 Cyc. 40 15
Note, 10 A. L. R., Ann., 851 ..... 28, 29
Note, 39 L. R. A. (N. S.), 391 23
Arts. 2544 to 2547, inc., Vernon's Annot. Texas Civil Statutes, Vol. 8, 131-136 5
Section 240(a) of Judicial Code 4
Sub-sections (f) and (g) of Section 9589 of the Revised Statutes of 1918 ..... 10-11, 11

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J. W. HAMPEL, ET AL., TRUSTEES IN BANKRUPTCY, ETC., ET AL., RESPONDENTS.

BRIEF OF PETITIONERS.

There has been no official report of the opinion rendered by the District Court in this case, but a copy appears on pages 62-63 of the Record. The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 18 Federal Reporter (2nd Series), 3, and appears on pages 70-72 of the Record.

Statement of the Grounds on Which Jurisdiction of the Supreme Court Is Invoked.

The judgment of the Circuit Court of Appeals was

rendered on March 25, 1927, a copy appearing on pages 72-73 of the Record.

The specific claims advanced by petitioners and the rulings made by the Circuit Court of Appeals for the Fifth Circuit complained of are shown by the following portion of their motion for a rehearing filed in the Circuit Court of Appeals:

"FIRST.

The Honorable Circuit Court of Appeals erred in determining that the words 'individual debts' used in the Bankruptcy Act, Section 5, Sub-sections (*f*) and (*g*), meant only debts of a partner for which the partnership is not liable.

"SECOND.

The Honorable Circuit Court of Appeals erred in determining that the words 'individual debts' used in the Bankruptcy Act, Section 5, Sub-sections (*f*) and (*g*), did not include an obligation of the individual partner created by his executing a bond as joint maker with, or surety or endorser for, the partnership, for the reasons:

(1) That such partner when so executing such bond with the partnership makes the debt evidenced thereby his individual debt.

(2) That there is nothing in the statute to indicate a distinction between the individual debt for which the partnership is also liable and such individual debt for which the partnership is not liable.

"THIRD.

The Honorable Circuit Court of Appeals erred in the application of the rule of the marshaling of assets as fixed by Bankruptcy Act, Section 5, Sub-sections (*f*) and (*g*), wherein the court said:

'He who has a right to resort to two funds,

to one of which alone another party may resort, must first exhaust the one to which the other party may not resort before coming upon the one to which both may resort,'

because the rule fixed by the provision of the Bankruptcy Act, Section 5, Sub-sections (*f*) and (*g*), directing the partnership debts to be paid out of the net proceeds of the partnership estate, and the debts of the individual partner to be paid out of the net proceeds of the individual estate of such partner, is applicable when the individual partner is bound by an express contract, even though the partnership may also be liable.

"FOURTH.

The Honorable Circuit Court of Appeals erred in reversing the judgment of the trial court allowing the claim of the respondent, C. Minkwitz, as treasurer of Fort Bend County, Texas, against the individual estate of the surviving members of the partnership who had jointly executed the bond with the partnership, the trial court having decreed such claim should have priority of payment out of the individual estates over the claim of the general creditors of the partnership.

"FIFTH.

The Honorable Circuit Court of Appeals erred in determining that the respondent holding an obligation of a bankrupt partnership upon which the individual members thereof had as joint makers, or as sureties, or endorsers, made themselves individually liable, was not entitled to have his claim allowed against the partnership estate and also against the individual estates of such individual partners, same to be paid out of the individual estates to the exclusion of the general creditors of the partnership, because such holding is contrary to the weight of authority and is inconsistent with

the rule announced in the adjudicated cases decided by the Second, Third, Fourth, Seventh and Ninth Circuit Courts of Appeals.''

(The petition for rehearing, covering five pages, has been omitted from the final record, as is shown on page 106 thereof. The portions of the petition for rehearing above quoted appear on pages 108-110 of the record filed in this court with the petition for certiorari, and also appear on pages 2 to 4 of the brief filed by petitioners in support of their application for a certiorari attached to the application.)

Jurisdiction of this court is invoked in accordance with the provisons of Sec. 240 (*a*) of the Judicial Code as amended by Act of Congress of February 13, 1925, effective May 13, 1925.

Concise Statement of the Case.

A. *Amount Involved:*

The amount involved, without interest, is over $300,000.00. (R. 6, 13.)

B. *Abbreviations Used:*

The Partnership—For J. H. P. Davis & Company, the partnership in bankruptcy.

The Surviving Partners—For J. H. P. Davis, R. E. L. Wessendorff, and E. Foerster, survivors of the partnership of J. H. P. Davis & Company, and likewise in bankruptcy.

The Sureties on Bonds Involved, not members of the partnership—For R. H. Darst, T. B. Wessendorff, A. P. George, T. W. Davis, Real F. Ransom, and J. W. Slavin.

The Trustees in Bankruptcy—For J. W. Hampel, George Hamman, and T. J. Holbrook, Trustees in Bankruptcy for J. H. P. Davis & Company and the surviving partners.

C. *The Obligation and Bonds Involved:*

In accordance with the provisions of the General Laws of Texas appearing as Arts. 2544 and 2547, inclusive, of Vernon's Annotated Texas Civil Statutes, Vol. 8, pages 131 to 136, the partnership of J. H. P. Davis & Company became the official depository of the funds of Fort Bend County, Texas, and obligated to the county for all money deposited with it and interest thereon. As required by the provisions of Art. 2547, this partnership subsequently, with ten individuals, executed two statutory bonds conditioned on the faithful performance by the partnership of all the duties and obligations devolving upon it by law as the official depository of the county. One of these bonds was for $300,000, and the other for $50,000. Both bonds were signed as follows:

"J. H. P. Davis & Co.,
By J. H. P. Davis,
President, as Principal.
E. Foerster,
R. E. L. Wessendorff,
J. H. P. Davis,
T. A. Wessendorff,
T. B. Wessendorff,
T. W. Davis,
R. H. Darst,
A. P. George,
Real F. Ransom,
J. W. Slavin,
As Sureties."

Both bonds stated that the partnership bound itself

as principal and the other parties as sureties, and that they were bound "both jointly and severally"; the parties signing the bonds were the partnership, the three surviving partners, T. A. Wessendorff now deceased and one of the partners, and six other persons not members of the partnership. (R. 18-22.)

D. *Proceedings Before the Referee:*

The partnership and the three surviving partners were adjudged bankrupt. C. Minkwitz, as treasurer of Fort Bend County and in its behalf, filed an amended claim before the referee in bankruptcy, charging that the partnership and the surviving partners were indebted to the county on the bonds in the sum of $334,136.24 with interest (R. 12-22), and that claimant had an individual claim against the individual assets of the three surviving partners in addition to its claim against the partnership. (R. 17-18.)

J. W. Slavin, A. P. George, T. W. Davis (now deceased, and who appears herein through his executor, A. P. George), R. F. Ransom, R. H. Darst and T. B. Wessendorff (they being sureties on the bonds involved but not members of the partnership) appeared before the referee, showed that they were creditors of the partnership and presented their claims as such; they likewise charged that the county of Fort Bend was entitled to have its claim allowed against both the partnership and the surviving partners and that said claim should be so allowed and should inure to their benefit. (R. 35-39.)

The trustees in bankruptcy contested the amended claim, asserting that there was no individual liability on the part of the surviving partners different or separate from their liability as members of the partnership

(R. 23-26), and that the claim should be allowed against the partnership only.

The referee ordered the claim allowed against the estate of the partnership and also against the individual estates of the surviving partners, jointly and severally (R. 39-40), and certified his action to the United States district judge. (R. 40-41.)

E. *Proceedings in the United States District Court:*

On petition for review the district judge, on November 14, 1925, affirmed the order of the referee, holding that Fort Bend County was entitled to file double proof against the partnership assets and against the individual assets of the surviving partners and entered an order to that effect. (Opinion R. 62-63; Order R. 63.) A petition to superintend and revise was filed by respondents and perfected to the United States Circuit Court of Appeals for the Fifth Circuit. (R. 1-7 and 64-67.)

F. *Proceedings in the Circuit Court of Appeals:*

On March 25, 1927, the Circuit Court of Appeals granted the petition to superintend and revise, holding that the referee and the District Court erred in allowing the debt to the county as a claim against the estates of the three surviving partners as individual debts of the partners, and remanded the case for further proceedings. (Judgment R. 72-73; Opinion R. 70-72.) A motion for rehearing was filed by petitioners and overruled by the court on April 15, 1927 (R. 73); petitioners filed an application for stay of mandate and execution for the purpose of applying to this Court for writ of certiorari. (R. 74-76.) On April 28, 1927, one of the judges of the Circuit Court of Appeals entered

an order recalling and staying the mandate of the court until June 1, 1927, provided applicant gave the necessary bond (R. 76); the bond was duly filed and approved as required by the last mentioned order. (R. 77-80.) On May 16, 1927, one of the judges of the Circuit Court of Appeals entered a further order extending the one last mentioned so as to permit applicants, or any one of them, to give the bond required (R. 80-81); a bond executed by one of the petitioners was then duly filed and approved. (R. 81-83.)

On the 16th day of May, 1927, Aileen E. Mitchell filed in the Circuit Court of Appeals an application for permission to continue and prosecute this cause as treasurer of Fort Bend County, Texas, as successor of C. Minkwitz, deceased, former treasurer of said county, and showed to the satisfaction of the court that C. Minkwitz had died pending the litigation and that Aileen E. Mitchell had succeeded the said Minkwitz as treasurer of Fort Bend County, Texas, and had duly qualified and was acting as such. (R. 121.) On the 16th day of May, 1927, the above application was granted by a judge of the Circuit Court of Appeals. (R. 84.)

On October 10, 1927, the petition for certiorari was granted by this Court. (R. 86.)

Specifications of Assigned Errors Relied On.

Petitioners complain that the Circuit Court of Appeals erred in the following respects:

1. In determining that the words "individual debts"

used in the Bankruptcy Act, Section 5, Sub-section (*f*), mean only debts of a partner for which the partnership is not liable.

2. In determining that the words "individual debts" used in the Bankruptcy Act, Section 5, Sub-section (*f*), did not include the obligation undertaken by the individual partners in the bonds involved.

3. In reversing the judgment of the District Court and holding that the respondent, C. Minkwitz, as treasurer of Fort Bend County, was not entitled to have his claim allowed against the individual estates of the individual surviving partners (as well as against the partnership estate), to be paid out of the individual estates in preference to the claims of the general creditors of the partnership.

The one point involved is whether or not the treasurer of Fort Bend County was entitled to have his claim allowed against the partnership estate and also allowed against the individual estates of the surviving partners, to be paid out of the individual estates in preference to the claims of general creditors of the partnership. The contention of petitioners is that the treasurer was entitled to make this double proof, while the Circuit Court of Appeals reached a contrary conclusion based upon its opinion that the words "individual debts," appearing in Sub-sections (*f*) and (*g*) of Section 9589 of the Revised Statutes of 1918, relating to bankruptcy, referred solely to debts for which the partnership was not liable.

The Argument.

The bonds involved appear in Record, 18-22; they

are distinctly joint and several obligations signed by the partnership as principal and by the partners and six other persons as sureties. They constitute contracts between Fort Bend County and the partnership; they likewise constitute contracts between Fort Bend County and the individual signers.

If these bonds, executed by both the partnership and the partners, constituted the only obligations involved the result would be the same as in a case where the partnership had bound itself by one obligation and the individual partners by another. It should be noted, however, that in this case the partnership, irrespective of the bonds, was obligated as the depository of the county for all money which came into its hands, and that the bonds were executed as additional security; we therefore have a case in which the liability of the partnership rests on an obligation other than the bonds as well as on the bonds themselves, and the individual liability of the partners rests upon the bonds alone.

The sections of the Bankruptcy Act involved are as follows:

> "(*f*) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his *individual debts*. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.
>
> "(*g*) The court may permit the proof of the claim of the partnership estate against the indi-

vidual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates." (Emphasizing type ours.)

The construction placed on the above sections by the Circuit Court of Appeals would preclude double proof by any creditor of a partnership and of members of the firm, without regard to the nature of the obligations held by him; for if such a creditor held the obligation of the partnership the construction of the Circuit Court of Appeals would preclude him from proving up his claim against the partners, and if he did not hold the obligation of the partnership he could of course not prove up his claim against it.

By superior diligence the county had secured obligations which placed it in the position of a creditor of the partnership and also of the individual partners. As a creditor of the partnership it has all the rights of other partnership creditors to share in the distribution of the partnership funds with priority over creditors of individual partners; and as a creditor of each individual partner it has all the rights of other creditors of that individual partner to share in the distribution of his funds with priority over creditors of the partnership; the only limitation on these rights is that the creditor may not collect from both sources more than the amount of his claim.

The language of the Bankruptcy Act contains nothing to justify the conclusion of the Circuit Court of Appeals, which is an attempt to amend the law, and that conclusion would deprive the creditor of the advantage properly secured by its diligence in securing additional

security, and would be in open violation of its contractual rights. It certainly cannot be assumed that Congress, in passing the Bankruptcy Act, intended to impair the obligation of a contract otherwise binding on the individual partners and their estates.

In the interest of brevity, petitioners will present their views under the following propositions with the authorities relied on grouped under each proposition.

First Proposition.

When a creditor holds an obligation of a bankrupt firm upon which individual members of the partnership have, as joint makers, sureties or endorsers, made themselves individually liable, he is entitled to prove his claim both against the partnership estate and the individual estates.

Authorities.

The above proposition has been specifically sustained in decisions of the Seventh, Fourth and Sixth Circuit Courts of Appeals; and recognized in two opinions of this court (*Chapman v. Bowen,* 207 U. S. 88, and *Myers v. International Trust Co.,* 273 U. S. 382), and in the decisions of the First and Second Circuit Courts of Appeals, in the following cases:

In re McCoy, 150 Fed. Rep. 106 (C. C. A., Seventh Circuit). This case reached the Supreme Court and is reported as *Chapman v. Bowen,* 207 U. S. 88. The court dismissed the appeal, but Chief Justice Fuller said: "The decision below proceeded on well settled principles of general law, broad enough to sustain it without reference to provisions of the Bankruptcy Act."

Bank of Reidsville v. Burton, 259 Fed. Rep. 218 (C. C. A., Fourth Circuit).
Buckingham v. Bank, 131 Fed. Rep. 192 (C. C. A., Sixth Circuit).
Reynolds v. New York Trust Co., 188 Fed. Rep. 613 (C. C. A., First Circuit).
In re Kardos, 17 Fed. Rep. (2nd Series), 707 (C. C. A., Second Circuit).

To the above the following authorities are added:

In re Farnum, Fed. Cas. No. 4674.
Emery v. Canal National Bank, Fed. Cas. No. 4446.
Fourth National Bank v. Mead, 216 Mass. 521.

Second Proposition.

A creditor holding a joint and several obligation signed by members of the bankrupt firm, but not in the firm name, when the proof shows that it was given for the benefit of the firm, and the consideration therefor became a partnership asset, can prove his claim against both the firm estate and the estates of the individual signers.

Authorities.

The above proposition permitting double proof under conditions stated in this proposition was recognized in:

Robinson v. Seaboard National Bank, 247 Fed. Rep. 667 (C. C. A., Third Circuit).
The same case on rehearing, 247 Fed. Rep. 1007.
Davis v. Turner, 120 Fed. Rep. 605 (C. C. A., Fourth Circuit).
In re Jarmulowsky, 287 Fed. Rep. 706 (C. C. A., Second Circuit).
Mock v. Stoddard, 177 Fed. Rep. 611 (C. C. A., Ninth Circuit).
In re Thomas, Fed. Cas. No. 13886.

Third Proposition.

When a creditor holds an obligation of a bankrupt firm, signed only in the firm name, and the proof shows that the partners wrongfully converted the property of such creditor, he can prove two claims, one against the firm, based upon the obligation signed by it, and the other against the partners jointly and severally who so converted his property, as upon an implied contract (the tort being waived) to pay the value of the property so converted by them.

Authorities.

In re Coe, 183 Fed. Rep. 745 (C. C. A., Second Circuit).

The above authority sustained double proof under conditions stated in this proposition.

The following authorities are cited to sustain the general principles involved in First, Second and Third Propositions:

Myers v. International Trust Co., 273 U. S. 382.
Schall v. Camors, 251 U. S. 239.
Francis v. McNeal, 228 U. S. 695.
Schall v. Camors, 250 Fed. Rep. 6 (C. C. A., Fifth Circuit).
Globe Indemnity Co. v. Keeble, 20 Fed. Rep. (2nd Series), 85.
Collier on Bankruptcy, 13th Edition, pp. 272-273.

Fourth Proposition.

The partnership members who signed the bonds must be regarded as principals whose liability is primary,

in relation to the liability of the six strangers (not members of the partnership) who signed it as sureties; the relation will be determined from the language of the contract and the law will look to the essence rather than to the form of the language used and the name given to the transaction by the parties themselves. The use of the word "surety" does not necessarily indicate that the promise is collateral.

Authorities.

Opinion of the District Judge in this case (Rec. 62-63).
32 *Cyc.*, 40.
Gasquet v. Thorn, 14 La. 506.
Wysong v. Meyer, 58 N. Y. App. Div. 422.
Giltinan v. Strong, 64 Pa. St. 242.

Fifth Proposition.

A partner who individually joins in an obligation of his firm for its accommodation is not indirectly or secondarily but primarily liable thereon, and the individual liability is not merged in that of the partnership.

Authorities.

30 *Cyc.* 531.
The Swallow, Fed. Cas. 13665.

In *Cyc.*, 534, it was said:

> "It is competent for the members of a firm, or any of them, to bind themselves severally as well as jointly for the firm debts by an agreement to that effect."

In *Francis v. McNeal*, 228 U. S. 700, it was said:

> "The nature of the liability (of the signers on

an obligation) is determined by the common law, not by the possible intervention of the bankruptcy act."

It was said in the opinion of District Judge Hutcheson in the court below, in referring to the bonds:

> "The substance and not the form is the desideratum in a transaction of this kind, and that substance here is that this partnership as a partnership signed the obligation; the partners as individuals signed the obligation and as between the creditor and them, the partnership and each individual are jointly and severally liable for the whole amount." (R. 62.)

The bonds under consideration constitute contracts of the individual members of the firm of J. H. P. Davis & Company, as well as contracts of the firm as a partnership, and the debt which arose in favor of Fort Bend County through the default on the bonds is the debt of the firm and of individual members of the firm.

Sixth Proposition.

The Circuit Court of Appeals, in holding that the words "individual debts" appearing in Sub-section (f) of Section 5 of the Bankruptcy Act mean only debts of individual partners for which the partnership is not liable, seeks by implication to add language after the words "individual debts" not found in the act itself, and is an attempt to amend and not to construe the law.

Review of Authorities.

This Court seems to have touched on the point involved only three times; first in *Chapman v. Bowen*, 207 U. S. 88, second in *Schall v. Camors*, 251 U. S. 239,

and third in *Myers v. International Trust Co.*, 273 U. S. 382. The first mentioned case was disposed of in the Circuit Court of Appeals under the title of *In re McCoy*, 150 Fed. Rep. 106, and in the lower court Judge Grosscup having held that a creditor holding a note signed by the firm of A. McCoy & Company, and also by the individual members of the firm, could prove his claim aganst both the firm estate and the individual estates, receiving dividends from the joint estate as a partnership creditor, and from the separate estates of the partners on their contract as individual creditors (a decision which will be reviewed hereafter), the case reached the Supreme Court on appeal. This court, while dismissing the appeal because not within the provisions of the then existing statute, took occasion to approve the judgment of the court below, through Chief Justice Fuller, in the following language:

> "The decision below proceeded on well settled principles of general law, broad enough to sustain it without reference to provisions of the Bankruptcy Act."

In *Schall v. Camors* (250 Fed. Rep. 6), the Circuit Court of Appeals for the Fifth Circuit had under consideration the question as to whether a claim, in its nature a tort, arising out of a partnership transaction, may be proved against the individual partners where the claim has been filed and allowed as a claim in contract against the partnership estate. It was said by Judge Grubb that the case presented involved two questions, (*a*) whether a claim in tort is provable at all under Section 63 of the Bankruptcy Act, and (*b*) whether, in case of a partnership transaction, it may

be proved doubly—against the estate of the partners and that of the partnership. He found it unnecessary to decide the first question but considered the second, and said:

> "If the partners had by separate contract of guaranty obligated themselves to the claimants, such separate contract would have afforded a basis for a claim against their individual estates. So if it had been shown that their individual estates had been enriched by the transaction complained of, or that they had been guilty of a separate and personal delinquency from that of the partnership, an individual obligation to make restitution to the injured claimant might have been implied." (P. 8.)

He further said that in the absence of a separate individual obligation, or a showing of benefit moving to the partner individually from the transaction, the court could see no reason for sustaining double proof of claim in favor of the implied obligation, and that it would be contrary to the policy of the bankrupt law for a firm creditor to be permitted to place himself on a parity with individual creditors of the partners as to his individual assets, thereby circumventing (so the court said) the equitable distribution of partnership assets among firm and individual creditors. He said that the question of double proof had been answered differently in the First and Second Circuits, citing *Reynolds v. New York Trust Company,* 188 Fed. Rep. 613, as supporting his opinion, and *In re Coe as contra.*

Schall v. Camors was affirmed by the Supreme Court in 251 U. S. 239, and settles the question that claims based upon a mere tort are not provable. But it was further said:

> "Where the tortious act constitutes at the same time a breach of contract, a different question may be raised, with which we have no present concern; and where, by means of a tort, the tort-feasor obtains something of value for which an equivalent price ought to be paid, even if the tort as such be forgiven, there may be a provable claim *quasi ex contractu.*" (P. 251.)

The opinion points out, on pages 254-255, that petitioners were insisting that the individual partners were responsible for frauds perpetrated as upon an implied contract, and then said:

> "But as the basis of a liability of this character is the unjust enrichment of the debtor, and as the facts show that no benefit accrued to the individuals as a result of the frauds beyond that which accrued to the firm, the logical result of the argument is that out of one enrichment there may arise three separate and independent indebtednesses."
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> • • •
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> "And since, in this case, the tort was done in the course of the partnership business, for the benefit of the firm and *without benefit to the partners as individuals*, no legal or equitable claim as against the individuals that might be deemed to arise out of it, by waiver of the tort or otherwise, can displace the equities of the creditors, recognized in the Bankruptcy Act, and put petitioners in a position of equality with others who actually were creditors of the individual partners, and of preference over other firm creditors." (Emphasizing type ours.)

Justice Pitney's opinion suggests that, had there been an enrichment of the individual partners, separate and apart from the enrichment of the firm, a creditor, waiving the tort, might have proved his claim as upon an implied contract against the individual members of the

firm. If the court had had under consideration an express written contract, such as the bonds held by Fort Bend County in this case, evidencing a contract of the firm and also a contract of the individual members, it seems clear to us that, in the view of Justice Pitney, double proof would have been permissible.

In the recent case of *Myers v. International Trust Co.*, 273 U. S. 382, this court approved the Massachusetts rule permitting double proof, and cited cases relied on in this brief in support of the rule.

Most of the Circuit Courts of Appeals allow double proof, thereby construing the words "individual debts" as used in the statute (Sec. 5, Subdivision *f*) to include debts of the firm members for which the partnership also is liable. We shall notice a number of these decisions.

In the case of *In re McCoy*, 150 Fed. Rep. 106, the Seventh Circuit Court of Appeals had under consideration a claim offered by a creditor based upon a note signed by the bankrupt firm of A. McCoy & Company, and also Alfred McCoy and Thomas McCoy, the individual members of the firm, the proceeds of the transaction going into the partnership business. It was held by the court (Judges Grosscup, Baker and Seaman) that the claim was provable against both the firm estate and the individual estates. The court quoted with approval from *Winslow v. Wallace*, 116 Ind., 317, and from *In re Thomas*, Federal Case No. 13886, both of which authorities sustain the theory of double proof. Judge Grosscup, writing the opinion, said that in England the old rule was that in administering the bankrupt laws of that country double proof against the partnership estate and the individual estates of the

partners was not allowed, "but," said the court, "this rule has not been followed in this country (citing authorities), and there is nothing in the bankruptcy act showing that this English rule was intended to be embodied in our act. Indeed, it is doubtful if the old rule is now in force in England."

In *Bank of Reidsville v. Burton,* 259 Fed. Rep. 218, the Circuit Court of Appeals for the Fourth Circuit had under consideration notes signed by the firm and by the members thereof. Proof was allowed as against both the firm assets and the estates of the individual partners. The court used the following language:

> "That every creditor who holds a note of a bankrupt firm upon which an individual member has, as joint maker, surety, or endorser, made himself individually liable, is entitled to prove his claim both against the partnership and the individual estates is too well settled for discussion." (Authorities cited.)

In *Buckingham v. Bank,* 131 Fed. Rep., 192, the Circuit Court of Appeals of the Sixth Circuit had under consideration notes of a bankrupt partnership signed in the firm (Estes & Company) name and endorsed by the individual partners. The notes were presented as claims against the individual property of Estes, and it does not appear that they were sought to be proved against the partnership. The court (Judges Lurton, Severens and Richards) said:

> "Doubtless the notes executed by the firm and endorsed by Estes were firm debts, as well as individual debts of Estes. But the holders had the right, if they preferred, to present them as claims against Estes individually."

In *Robinson v. Seaboard National Bank* (*In re Kuhn & Co.*) 247 Fed. Rep. 667, the Circuit Court of Appeals for the Third Circuit had under consideration claims based upon joint and several obligations of the members of the partnership, signed in their individual names, but without the signature of the firm. The proof showed that the proceeds of the notes were borrowed for, and were used by, the partnership for the firm's use and benefit and that it was the practice of the firm to borrow money on the individual notes of its members. It was held that the claims were provable against both the parnership estate and the individual estates of the partners.

The opinion by Circuit Judge Buffington is a clear, though concise, discussion of the law. Language of the referee was quoted with approval, as follows:

> "When the partners jointly agreed to pay (this being a firm transaction) they bound the firm; and when they severally agreed to pay they bound themselves as individuals. It is not apparent why this joint or firm obligation, and the several or individual obligations, should differ in principle or legal effect from that where the firm executes the obligation and the individual endorses it." * * *

The court then added:

> "This is not a case of double proof on a single contract, but of single proof on two separate contracts. The referee and the court below enforced the two distinct contract obligations, embodied in the one note by enforcing each contract. Those contracts were cumulative, and not restrictively selective." (247 Fed. Rep., 668-9.)

On rehearing the court said the question was, should

the claimants have been permitted to make double proof of their claim.

> "And on this point we continue to believe that the evidence before us warrants the application of the American rule. We shall not discuss this disputed question. Those who wish to pursue it may be referred to *Re Farnum*, Federal case No. 4674, also the note in 39 L. R. A. (N. S.) 391, and to 3 R. C. L., Sec. 49. But we do not assent to the conclusion stated in 3 R C. L. that double proof is only to be allowed 'where the double claim is based upon the joint obligation of the firm and also an independent obligation or undertaking of the individual partner,' if this statement means that the 'independent obligation or undertaking of the individual partner' must be based on a separate writing (*e. g.*, an endorsement), or on a separate oral contract. We can see no sufficient reason for such a requirement. In our opinion a partnership obligation and the separate obligations of the individual partners may (as in the pending case) be contained on the face of the same instrument. If the evidence shows that the firm as such and the individual partners as such have bound themselves by the same act, the result is that three (or more) contracts have been entered into at the same time and by the same transaction. And in that event, as in any other case of a joint and several obligation, each of the contracts thus entered into should be followed by its appropriate consequence. Hence it was proved that each 'joint' contract was a firm contract, while the 'several' contracts, of course, bound the makers individually." (247 Fed. Rep. 1007-8.)

In re Thomas (Federal case No. 13886) a note was signed by the members of the partnership, but not by the firm name, but it was shown that the note was given for the use and benefit of the firm. It was held

that a holder of the note could prove the same against the firm estate, without surrender of security against the separate property of a member of the firm, and the court states and approves the rule allowing double proof.

In re Farnum, Federal case No. 4674, Judge Sprague (District of Massachusetts) had under consideration a draft drawn by the firm and endorsed by one partner, and it was held that the holder of such draft was entitled to dividends from the joint estate of the firm and from the separate estates of the endorsing partner.

While the last two cases cited are decisions of district courts, they contain valuable discussions bearing upon the question of permitting double proof under our bankruptcy laws, and, together with *Emery v. Canal National Bank* (Federal case No. 4446) are in reality the leading cases, and are cited by nearly all of the late cases and regarded as establishing the American rule in contradistinction to the English rule. It may be mentioned, in passing, that the late cases allowing double proof under the bankruptcy act of 1898 cite these three cases with approval, it being pointed out in several of them that the reasoning in those cases is as applicable to the present law as to the earlier bankruptcy acts.

The opinion in *Emery v. Bank* (*supra*) was written by Circuit Judge Clifford, and the decision is that a creditor holding commercial paper signed by a firm (in bankruptcy) and endorsed by an individual member of the firm, also bankrupt, may prove his debt against both estates and share in the dividends of each.

In the case of *In re Coe* (183 Fed. Rep. 745) the Cir-

cuit Court of Appeals for the Second Circuit had under consideration acceptances signed by Cadenas & Coe, a bankrupt firm.

These acceptances showed that property received by the firm was owned by the creditors, the firm merely holding as bailee. The firm sold the property, collected the price and converted it to its own use and then failed.

One member of the firm offered a composition of 20 per cent in bankruptcy which was accepted; the creditor then made proof of his claim as against the other individual bankrupt, Coe. It was held that the conversion of the property by the firm made its members jointly and severally liable as tort-feasors and it was said:

> "The bank could prove two claims, one against the firm—*i. e.*, the partners jointly on the acceptances—and the other against the partners jointly and severally upon an implied contract (the tort being waived) to repay money of the bank wrongfully converted by them. The doctrine of election between inconsistent remedies on the same claim has no application."

In the case of *In re Kardos*, 17 Fed. Rep. (2nd Ser.) 707, the Circuit Court of Appeals for the Second Circuit, opinion by Judge Hough, the following language is used:

> "It cannot be doubted that a proof can be submitted, making claim against both a partnership estate and the estates of the individual partners. There is nothing necessarily inconsistent in making such demand";

the court cites *In re Coe* and *In re McCoy* in support of the above.

The case of *Reynolds v. New York Trust Company,* 188 Fed. Rep. 611, decided by the Circuit Court of Appeals for the First Circuit, as heretofore indicated, was cited by the Circuit Court of Appeals for the Fifth Circuit in *Schall v. Camors* as supporting that decision and as in conflict with the Coe case, above reviewed. The decision in the Reynolds case supports the decision in *Schall v. Camors,* but it is clear that it is not in conflict with any of the cases which authorize double proof —that is, proof against the partnership estate and the individual estates of the partnership members, when based upon express contracts of the firm and of the co-partners—and, therefore, does not support the decision of the circuit court of appeals in the instant case, because the bonds under consideration here constitute express contracts both of the bankrupt firm and of its individual members.

In the Reynolds case the bankrupt firm of E. H. Gay & Company came into possession of bonds belonging to the New York Trust Company, which bonds, under the agreement, were to be delivered to the Trust Company. Gay & Company, without authority of the Trust Company, pledged the bonds for loan obligations for the benefit of the firm. The proof by stipulation showed that no attempt was made by the Trust Company, a creditor, to show that the unauthorized pledge of the bonds was the individual act of Gay. The Trust Company filed its claim against both the partnership of Gay & Company and E. H. Gay individually. The claim against both estates was allowed. An appeal was taken by the trustee to the allowance of the claim against the individual estate. On this state of facts

the Circuit Court of Appeals of the First Circuit reversed the lower court, holding that the claim as presented was not provable against the individual estate of E. H. Gay.

The court stated that the claim as against the individual estate of E. H. Gay was based solely upon the theory of an implied contract arising from the conversion of the bonds by Gay & Company in the course of the firm business, and called attention to the fact that no attempt had been made to show that the unauthorized pledge was the individual act of E. H. Gay, and said that it did not appear that E. H. Gay individually received benefit from the transaction. The court mentioned that it was contended by the Trust Company that the conversion was in course of firm business and that the partners thereby became jointly and severally liable in tort for the conversion, and that upon a waiver of tort there arose implied contracts of both the firm and of the individual partners to pay the value of the bonds converted to the use of the firm, following which the court used this language:

> "Where there are separate and distinct express contracts of the firm and of a co-partner to pay a debt contracted by the firm, the right to prove against both estates may be conceded. If one dealing with a firm procures also the individual undertaking of a partner to answer for the firm debt, there are substantial reasons for permitting him to resort to both estates." (Citing *In re McCoy and Chapman v. Bowen.*)
>
> "The additional several contract of a partner is not implied from the firm transaction, but must be created by a distinct act of the co-partner." (P. 613.)

It seems to us that the Circuit Court of Appeals for the Fifth Circuit stands alone in disallowing double proof where a creditor holds an express obligation both of the firm and its members.

We call the court's attention to the editorial note on, and annotation of, the case of *Schall v. Camors,* (250 Fed. Rep. 6; 162 C. C. A. 178), as found in 10 A. L. R. 851, *et seq.* In this note the question of allowance of double proof of a claim against the estate of a firm and the estate of individual partners is discussed at length, with a review of the decisions bearing upon the question. Many of the decisions that we have attempted to review are discussed in this note, and we shall not attempt to follow in detail the editor's comments. However, we do call attention to several matters covered by the note, and several statements made therein.

It will be noted at once that the former English rule and the American rule on the subject are different. The English practice, crystallized into a rule at an early date, was that joint and several creditors could not resort to both estates. The rule as stated was probably the result of *Ex parte Rowlandson,* which was decided in 1735 (3 P. Wms., 405) and became a rule of property in England, so much so that later decisions, while expressing dissatisfaction with the rule, adhered to it. In *Ex parte Bevan,* 10 Ves. Jr., 107, decided in 1804, Lord Eldon said that he had never been able to understand why a creditor having a joint and several security should not go against both estates, but that it was settled otherwise upon rules not very intelligible. (10 A. L. R. Ann. 852.) The English rule was changed by Act of Parliament in 1869.

The editorial writer of the note referred to recognized an American rule, as contra-distinguished from the original English rule, allowing double proof, such as we are contending should be allowed in the instant case. In the note found at 10 A. L. R. Ann. 851-852, it is said:

> "It seems to be settled, not only under State insolvency laws, but under the Bankruptcy Acts in England and America, that proof cannot be made against both the partnership and individual estate merely because of the partnership relation, *but such proof may be made if the partnership and the individual are jointly and severally liable upon the obligation or if there is an individual liability of both partnership and partner for the same debt.*" (Emphasizing type ours.)

In the light of the decisions reviewed herein, and reviewed with far greater ability in the note found in 10 A. L. R. Ann. it seems clear that the Circuit Court of Appeals for the Fifth Circuit is out of harmony with the other circuit courts of appeals on the question under consideration. All of the other circuit courts that have spoken on the question, so far as we are able to find, allow double proof, thereby interpreting the langoage "*individual debts*" found in the statute, to include debts of individual members of a firm for which the firm is also obligated.

So far as this court has touched upon the question its action is in harmony with the other circuit courts, rather than with the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

T. W. Gregory,
W. N. Foster,
Fred R. Switzer,
Solicitors for Petitioners.

Office Supreme Court, U. S.
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MAR 5 1928
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(13)

MEMORANDUM.

No. 269

AILEEN E. MITCHELL, TREASURER, ET AL., ETC.,

v.

J. W. HAMPEL ET AL., TRUSTEES, ETC.

The principle of contribution has no application to the facts of this case, but the partnership strangers who signed the bonds are entitled to indemnity as against the partnership members who subscribed them.

30 Cyc., 531;
The Swallow, Fed. Cas., No. 13665;
Corpus Juris, Vol. 13, 822;
Corpus Juris, Vol. 29, 169;
Moore *v.* Moore, 15 American Decisions, 523 (N. C. Supreme Court);
McDonald *v.* McGruder, 3 Peters, 470;
Opinion of the district judge in this case, Record, p. 62.
Gasquet *v.* Thorn, 14 La., 506;
Wysong *v.* Meyer, 58 N. Y. App. Div., 422;
Giltinan *v.* Strong, 64 Pa. St., 242;
In re Grays Est., 18 N. E., 719;
Turner *v.* Overall, 39 S. W., 757.

T. W. GREGORY,
W. N. FOSTER,
FRED SWITZER,
For Petitioners.

MEMORANDUM.

No. 269

AILEEN E. MITCHELL, TREASURER, ET AL., ETC.,

v.

J. W. HAMPEL ET AL., TRUSTEES, ETC.

The ruling of the circuit court of appeals and the lower court allowing Fort Bend County's claim for the full amount, without deduction of the $108,000 that had theretofore been paid by the partnership strangers, sureties on the bond, was correct and should be sustained.

U. S. Compiled Statutes (1916), Sec. 9641, Subdivision I;

In re Noyes Bros. (C. C. A.), 127 Fed., 286;

Swartz *v.* Fourth National Bank (C. C. A., 8th Circuit), 117 Fed., 1;

In re Heyman, 95 Fed., 800;

Stewart *v.* Armstrong (C. C. A.), 56 Fed., 167;

Insley *v.* Garside (C. C. A., 9th Circuit), 121 Fed., 699.

T. W. GREGORY,
W. N. FOSTER,
FRED SWITZER,
For Petitioners.

(14)

Office Supreme Court, U.
FILED
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CHARLES ELMORE CROPLEY
CLERK

No. 11[redacted]2 69

IN THE

Supreme Court of the United States

October Term 1927

AILEEN E. MITCHELL (Successor of C. Minkwitz, Former Treasurer of Fort Bend County, Texas), as Treasurer of Fort Bend County, Texas, et al.,
Petitioners,

v.

J. W. HAMPEL ET AL., Trustees in Bankruptcy, etc., et al.,
Respondents.

ANSWER OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

— BY —

LEWIS R. BRYAN,
E. B. COLGIN,
Solicitors for Respondents.

C. C. YOUNG PRINTING COMPANY, HOUSTON

INDEX

	PAGE
Preliminary Statement	1- 5
First Proposition	6
Authorities under First Proposition	6- 7
Second Proposition	7
Authorities under Second Proposition	7
Third Proposition	7- 8
Authorities under Third Proposition	8
Fourth Proposition	8- 9
Authorities under Fourth Proposition	9
Review of Authorities under First Proposition	9-11
Review of Authorities under Second Proposition	11-14
Review of Authorities under Third Proposition	14-16
Review of Authorities under Fourth Proposition	16-18
Conclusion	18

AUTHORITIES

	PAGE
Bank v. Cup & Company, 59 Tex. 268	14
Bankruptcy Act, Sec. 5, subdivision (g)	16
Bayne et al. v. Cusimano, 23 Southern 361	14
Daniel on Negotiable Instruments, Sec. 303	10
Fort Pitt Coal & Coke Co. v. Diser et al., 239 Fed. 443	16
Fourth National Bank v. Mead, 216 Mass. 521, 104 N. E. 377	10
Fowler Commission Co. v. Charles Land & Company, 248 S. W. 314	11
Francis v. McNeal, 228 U. S. 695	11
Laning v. Iron City National Bank of Llano, Tex., 36 S. W. 431	14
Meyers v. International Trust Co., U. S. Supreme Court Advance Opinions 1926-1927, page 417	9
William Schall et al. v. Frederic Camors et al., 251 U. S. 239-254	18
Trinity Portland Cement Co. v. Lion Bonding & Surety Co., 229 S. W. 483	11
Vernon's Sayles' Civil Statutes 1914, Art. 2443	6
Vernon's Sayles' Civil Statutes 1914, Art. 6127	6

IN THE

Supreme Court of the United States

October Term 1927

AILEEN E. MITCHELL (Successor of C. Minkwitz, Former Treasurer of Fort Bend County, Texas), as Treasurer of Fort Bend County, Texas, et al.,
Petitioners,

v.

J. W. HAMPEL ET AL., Trustees in Bankruptcy, etc., et al.,
Respondents.

No. 1153

ANSWER OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Preliminary Statement.

Respondents believe a more complete statement of the facts is necessary for an understanding of the theory of law on which the decision of the Circuit Court of Appeals for the Fifth Circuit is based. This statement is as follows:

1. In February, 1921, J. H. P. Davis & Company,

bankers, unincorporated, of Fort Bend County, Texas, who, on competitive bids, had been chosen as county depository of that county, executed a bond under the requirements of Chapter 2, Acts of the Thirty-fifth Legislature, by the terms of which it obligated itself to pay to the County Judge of Fort Bend County, Texas, the sum of $300,000.00, conditioned as required by law. J. H. P. Davis & Company, by J. H. P. Davis, signed the partnership name as principal, and thereafter J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff, E. Foerster, T. B. Wessendorff, T. W. Davis, R. S. Darst, A. P. George, Real F. Ransom and J. W. Slavin signed their names as sureties. (Tr. p. 42.) There was also a similar bond for $50,000.00. (Tr. p. 15.) In due course of time said partnership became insolvent, and both the partnership itself and its surviving members, on March 31st, 1923, executed a general assignment under the laws of the State of Texas for the benefit of creditors, and appointed a Trustee, who qualified and acted as such until the 7th day of August, A. D. 1923, when said partnership firm and each of said members, to wit, J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, were duly adjudicated bankrupt by the District Court of the United States for the Southern District of Texas —T. A. Wessendorff, a member of said firm, having theretofore committed suicide, to wit, March 21st, 1923. (Tr. p. 62.)

2. After this assignment had been made for the benefit of the creditors, T. B. Wessendorff, T. W. Davis, R. S. Darst, A. P. George, Real F. Ransom and J. W. Slavin, each paid the sum of $6000.00, or a total of $36,000.00, and, after said adjudication of bankruptcy,

the last six named sureties on said county depository bond for J. H. P. Davis & Company, and who were not members of said partnership firm, paid on account of the indebtedness to said treasurer in consequence of the failure of said unincorporated bank, the sum of $12,000.00 each, or a total of $72,000.00. These respective payments were applied by said treasurer on account of and as a credit of $108,000.00 upon the total indebtedness to the county, which amounted to $334,136.24. (Tr. p. 33.)

3. After these payments had been made by said sureties, C. Minkwitz, in the capacity of Treasurer of Fort Bend County, filed a claim on behalf of said county, on August 22nd, 1923 (Tr. p. 17), but subsequently amended same, and as amended claimed:

(*a*) Against the partnership estate of J. H. P. Davis & Company for the entire amount of $334,136.24, without giving credit for the $108,000.00, or any part thereof, received as payment from said sureties, as aforesaid; and,

(*b*) Against individual estates in bankruptcy of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, for the entire amount of $334,136.24, without giving credit for the amount received from said sureties, which credit, as above stated, amounted to $108,000.00. (Tr. pp. 4-17.)

4. J. W. Hampel, Geo. Hamman and T. J. Holbrook, as Trustees for J. H. P. Davis & Company, and I. R. Bryan, for himself and other creditors, opposed the making of double proof by and allowance of a preference to Fort Bend County, and the sureties on said bond not members of the partnership, and thereupon filed

their contest and opposition to the allowance of double proof and preference, and also, in the alternative, to the allowance of the entire claim of said Treasurer for the county without taking into account the payments which had been made by said sureties in the sum of $108,000; and they also claimed, in the alternative, that if double proof could be made, and preference given Fort Bend County, and the sureties not members of the partnership, the equitable principle of contribution covering the obligations of sureties among themselves, as well with their principal should apply (Tr. pp. 18, 24, 27); but on hearing before the Referee in Bankruptcy on the 5th day of December, 1924, the contest of said allowance was overruled and denied, and the claim was allowed, both against said partnership estate and said individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, for the entire amount of $334,136.24 (Tr. p. 63); the Referee filed his findings and his certificate. (Tr. pp. 41, 42.) The effect of this double allowance was to give priority to said claim over the claims of all the other general creditors of the partnership insofar as it related to said individual estates of the members of said firm in bankruptcy.

5. Feeling themselves aggrieved by the rulings of the Referee, the said J. W. Hampel et al., as Trustees of said J. H. P. Davis & Company, and also I. R. Bryan and other creditors, filed a petition for review before the Honorable United States District Court for the Southern District of Texas. (Tr. p. 65.) On hearing had before that court, the ruling of the Referee was sustained and a decree was entered allowing the making

of double proof and preference, as aforesaid, for the entire claim. (Tr. p. 74.)

6. Thereupon, the Trustees of said J. H. P. Davis & Company and said creditors, feeling themselves aggrieved by the ruling and decree of said District Court, seasonably filed their petition for appeal to the Circuit Court of Appeals for the Fifth Circuit, which court upon hearing reversed the judgment of the District Court in an opinion found on pages 103 to 105 of the Transcript of Record.

7. On the hearing before the Referee, one of the partners, E. Foerster, and one of the depositors in said bank, Mason Briscoe, testified that it was represented by the partners and generally understood by the creditors of said bank that everything that the bank had, including everything that J. H. P. Davis and the other partners had individually, except personal exemptions, was absolutely behind every cent on deposit in said bank. (Tr. pp. 51 to 56.)

8. If Fort Bend County and the sureties other than the members of the partnership be given a preference over the other general creditors out of the individual estates of the partners, the other general creditors, including hundreds of depositors of the bank, will be paid approximately 40 cents on the dollar, but under the decision of the Circuit Court of Appeals for the Fifth Circuit in this case all the creditors will be paid approximately 80 cents on the dollar of their claims.

The Circuit Court of Appeals for the Fifth Circuit did not err in reversing the judgment of the District Court, because:

I.

The decision of the Circuit Court of Appeals for the Fifth Circuit properly determined the rights of the parties to a non-negotiable contract, an indemnity bond wholly the creature of the statutory law of the State of Texas, in accordance with the law of the State of Texas.

Authorities.

Vernon's Sayles' Civil Statutes 1914, Art. 2443.
Revised Statutes of the State of Texas, 1925, Art. 2547.

The foregoing statute provides as follows:

"Within five days after the selection of such depository it shall be the duty of the banking corporation, association or individual banker so selected to execute a bond or bonds, payable to the county judge and his successors in office, to be approved by the commissioners court and comptroller and filed in the office of the clerk of said county, with not less than five solvent sureties, who shall own unincumbered real estate in this State not exempt from execution under the laws of this State of as great value as the amount of said bond, or of as great value as the amount of all of said bonds when more than one bond; and said bond or bonds shall in no event be for less than the total amount of revenue of such county for the next preceding year for which the same are made. Nothing herein shall prevent the making of such bond or bonds by a surety company or companies, as provided by law, and payable as herein provided. The commissioners court may accept in lieu of such real estate or surety company, security bonds of the United States, or of this State or of any county, city, town or independent school district in the State,

which shall be deposited as the commissioners court may direct, the penalty of said bond or bonds not to be less than the total amount of the annual revenue of the county for the years for which said bond or bonds are given, and shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon such depository, and for the payment upon presentation of all checks drawn upon said depositary by the county treasurer of the county, and that said county funds shall be faithfully kept by said depository and accounted for according to law. Any suits arising thereon shall be tried in the county for which such depository is selected."

II.

The substantive law of the State of Texas, where the contract (bond) was executed and was to be performed, determined whether the members of the co-partnership of J. H. P. Davis & Company could become sureties on the foregoing statutory bond, and whether by attempting to sign as sureties they created any individual obligation in favor of Fort Bend County and the sureties on said bond who were not members of the firm in contradistinction from their individual obligations as members of the co-partnership of J. H. P. Davis & Company.

Authorities.

Samuel A. Meyers v. International Trust Co., U. S. Sup. Ct. Advance Opinions 1926-1927, p. 417.
Trinity Portland Cement Co. v. Lion Bonding & Surety Co., 229 S. W. 483.

III.

Under the substantive law of the State of Texas, the

members of the co-partnership of J. H. P. Davis & Company were jointly and severally liable to the creditors of the firm, and they could not make themselves individually liable in contradistinction from their individual liability as such members of the firm by attempting to become sureties on their co-partnership bond, the debt created by the bond being exclusively for the benefit of the partnership.

Authorities.

Vernon's Sayles' Civil Statutes, 1914, Art. 6127.
Revised Statutes of Texas, 1925, Art. 6111.
Fowler Commission Co. v. Charles Land & Co., 248 S. W. 314.
Bank v. Cup & Company, 59 Tex. 268.
Laning v. Bank, 36 S. W. 431.

IV.

The assets of the partnership and the assets of the individual partners having been drawn into the administration of the bankruptcy court, the Circuit Court of Appeals for the Fifth Circuit, in refusing to allow the claim of Fort Bend County and the sureties on the depository bond who were not members of the partnership to be approved for the full amount of $334,136.24 against both the partnership estate of J. H. P. Davis & Company and the individual estates of the partners, which was not credited with the sum of $108,000.00 already paid thereon, correctly prevented, under Section 5, Subdivision (g), of the Bankruptcy Act, Fort Bend County and the said sureties from getting in every equitable sense an inequitable preference, and has thereby secured to all creditors an "equitable distribu-

tion of the property of the several estates" as intended by said section of the Bankruptcy Act.

Authorities.

Section 5, Subdivision (g), Bankruptcy Act.
Fort Pitt Coal & Coke Co. v. Diser et al., 239 Fed. 443.
Schall v. Camors, 251 U. S. 239.

Review of Authorities Under the First Proposition.

This court, in Meyers v. International Trust Company (February 21st, 1927, opinion by Mr. Justice Sandford), had occasion to determine whether an indorsement by a partner on a note of the partnership in Massachusetts created an individual liability, and reached the conclusion that it did, because it was settled under the laws of Massachusetts that a partner who indorsed a firm note as an individual incurs—in addition to the liability for partnership debts arising from his membership in the firm—a distinct and separate liability.

Probably this application of the substantive law of Massachusetts by this court will explain the authorities cited by the petitioner as being in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit. Most States have adopted the Uniform Negotiable Instruments Law. Under it a partner who becomes a surety on a partnership note creates a separate and distinct obligation from that as partner, because under the law merchant this character of paper is intended to pass in channels of commerce without question to facilitate trade, and no person taking such paper

in payment for goods, perhaps far distant from the place of its origin or the residence of its maker and indorser, should be required to ascertain whether the indorsement gives it any added security. This is forcibly expressed in Daniel on Negotiable Instruments, Section 303, where it is said:

> "No party can be charged as principal upon a negotiable instrument unless his name is thereon disclosed. The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment; it is 'courier without luggage,' whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal, party thereto, unless his name in some way is disclosed upon the instrument itself; although upon other written contracts, not negotiable, it is often competent to show that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that he should be bound. And in such cases he is bound upon them accordingly."

Again, it was said in the case of Fourth National Bank v. Mead, 216 Mass. 521, 104 N. E. 377, that a member of a partnership placing his name on the back of a firm note *"is a person not otherwise a party"* to the instrument within the meaning of the Negotiable Instruments Act, and will *make him liable as indorser.*

Hence, it is clear that the decisions giving the holder of negotiable notes executed by a partnership and indorsed by the individual members of the firm the right to double proof are not in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in

this case, since this suit involves a statutory bond on which the partners could not obligate themselves individually in contradistinction from their individual or several liability as partners thereon as principals. This is the rule in Texas, and that rule is a part of the bond. The Commission of Appeals of Texas, on March 9th, 1921, in a decision styled Trinity Portland Cement Company v. Lion Bonding & Surety Company, 229 S. W. 483, which decision was adopted and entered by the Supreme Court of the State of Texas as its judgment, held:

> "The principles and rules of law applicable to the construction of contracts are so elementary and so familiar to the profession that it is unnecessary to set them forth. It is sufficient to say that all parties in anywise connected with the contract were presumed to know the law, and that the instruments above quoted from must be construed together, and be construed also in connection with the statute above cited, which by conclusive implication of law was written into the contract and became as much a part of the bond as though it were expressed therein, and the bond must be read and understood in the light of it."

Review of Authorities Under the Second Proposition.

Prior to the decision of the United States Supreme Court in the case of Francis v. McNeal, reported in 228 U. S. 695, rendered on May 26th, 1913, there were frequent judicial holdings that within the scope of the Bankruptcy Act a partnership was an entity separate and distinct from the members who composed it, and that, therefore, when a partnership was adjudicated a bankrupt, the individual estates of the parties who com-

posed the partnership were not drawn into the administration of bankruptcy. However, the McNeal case, by the Supreme Court, overthrew all those decisions which announced the erroneous principle mentioned. Mr. Justice Holmes, in delivering the opinion for the court, had occasion to say:

> "But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for it continuing out. The necessary and natural meaning goes no further than that."

Again he said:

> "Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between the firm and members under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the Act, is to administer both in bankruptcy."

In other words, this decision has set at rest the false notion that there is any distinction between the partnership and the members who compose it. In Texas, common law rules in respect to partnerships have been abolished, and contracts of partnership are joint as to all of the partners and several as to each of them. So

that it is not necessary in this State for a creditor of the partnership to sue the partnership in order to hold any individual members personally liable on the indebtedness. A creditor of the firm may sue just one of the partners in his individual capacity without proceeding at all against the partnership. This was the specific holding in Fowler Commission Company v. Charles Land & Company, decided by the Commission of Appeals and adopted by the Supreme Court of Texas, and entered as its judgment on February 28th, 1923, reported in 248 S. W. 314, where it was said:

> "In this State, common law rules have been abolished, and the contracts of a partnership are joint as to all of the partners and several as to each of them. A holder of a claim against a partnership may proceed against any of the partners individually, and it is not necessary to join either of the other partners or the partnership. As between the partners, equity may require a marshaling of joint assets in payment of joint liabilities, or require contribution from one member to another, where a partner has been required individually to pay a partnership debt, but this does not limit the right of creditors to select any individual of the firm and collect their claims wholly from his individual property."

The foregoing is the latest expression of the Supreme Court of Texas as to the legal status of the partnership and the individual partners, and re-affirms what has been the rule in Texas for an indefinite period in the past.

Review of Authorities Under the Third Proposition.

Under the substantive law of Texas a member of a partnership may not become a surety for the partnership, for while the question was not directly decided, it is significant that in Bank v. Cup & Company, 59 Tex. 268, the Supreme Court of Texas held that a stockholder of a corporation could sign an attachment bond as surety thereon, *because he was not a partner,* and the corporation was a distinct entity from the stockholder. The clear implication is that if it had been a partnership, the holding of the court would have been otherwise.

It was likewise held by one of the Courts of Civil Appeals of Texas in 1896, in a case styled Laning v. Iron City National Bank of Llano, Texas, 36 S. W. 431, that:

> "We do not think there is any merit in the proposition that the officers and directors of the bank could not become sureties on its bond for attachment. The bank is a corporation, in law a separate and distinct person from its stockholders, directors and officers; and, there being no statutory inhibition against it, we are satisfied that the directors and officers of the bank could properly become its sureties on the attachment bond."

Such also is the rule in the State of Louisiana, where in Bayne et al. v. Cusimano, 23 Southern, at page 361, the Supreme Court of Louisiana said in part:

> "The question presented is: Can an individual member of a co-partnership become surety on an attachment bond executed by his firm as principal? Is his such security as the law contemplates on a bond of this character? It is shown that the firm name was signed to the bond by Onorato, the

junior member, while Bayne, the senior, signed it as surety in his individual capacity. Because Onorato and not Bayne signed the name of the firm to the bond as principal can make no difference. If Bayne individually was legally competent as surety, he would be so even though he himself had already signed the firm name as principal. It is claimed that B. & O. is an ordinary, and not a commercial partnership, and from this it is concluded that as each partner is bound only for his share of the obligation of the bond—that is to say, for one-half thereof—nothing prevents one of the partners from becoming surety for his co-partner to the extent of the latter's liabiliy on the bond. While from the testimony found in the record touching the character of the business done by the firm, we are by no means satisfied that this partnership is to be classed merely as an ordinary one, in our appreciation of the question under consideration, it makes no difference whether the obligation of the partners on this attachment bond be solidary or each for his share only. B. & O. are required by law to give as surety on their attachment bond one good and solvent person. While it is true that in a sense a partnership is a legal entity distinct from the individual members composing it, there can be no doubt that the several members, as well as the partnership itself, must be viewed as principals on an attachment bond signed in the firm name for the purpose of taking out an attachment at the suit of the firm. And the extent of the individual liability of its members for the obligors of the partnership does not affect this. Mr. Bayne then is the principal in the attachment obligation. He is bound on the bond in that character. How could he be both principal and surety at one and the same time in the same obligation and for the same liability? We hold, therefore, that Bayne, one of the partners in the creditor firm suing out the attachment, is to be viewed as principal in the attachment bond, and

being such, could not become surety on the same bond."

It would be against a plain public policy, as evident from the wording of the statute itself, to accept the individual members of a partnership on the bond of the firm under this article, when the members of the partnership are already obligated severally as absolutely and with as much far-reaching effect by the execution of the bond by J. H. P. Davis & Company as though they had each signed their individual names as partners.

Review of Authorities Under the Fourth Proposition.

It seems that Section 5, Subdivision (g), of the Bankruptcy Act, gives the court power to

> "marshal the assets of the partnership estate and individual estates so as to prevent preference and secure the equitable distribution of the property of the several estates"

before it becomes the duty of the court to carry out the provisions of Section 5, Subdivision (f), of the Bankruptcy Act. In this case the Circuit Court of Appeals for the Fifth Circuit might have based its decision upon its power to secure the equitable distribution of the property of the several estates given by Subdivision (g) of Section 5 of the Bankruptcy Act, as was done by the Circuit Court of Appeals for the Sixth Circuit in Fort Pitt Coal & Coke Company v. Diser et al., 239 Fed. 443, in which Greer Brothers, a co-partnership composed of John L. Greer and Robert C. Greer were indebted to the Fort Pitt Coal & Coke Company, and on December 31st, 1914, executed a note payable to the Fort Pitt Coal

& Coke Company for $4000 and a note for $373.30, each of which notes was given to cover the indebtedness owing by the partnership, and each of which notes was indorsed by John L. and Robert C. Greer, and the $4000 note was secured by a chattel mortgage upon personal property of the firm and of the individual partners. Judgment was obtained on the note for $373.30 against the partnereship and the partners individually. In March of 1915 the partnership was adjudicated a bankrupt, and the estates of the individual partners were drawn into the bankruptcy court for administration, though the individual partners were not adjudicated bankrupts. The Bankruptcy Court held that technical preferences had been given to the Fort Pitt Coal & Coke Company, and disallowed the claim against the individual estates. The case was appealed to the Circuit Court of Appeals for the Sixth Circuit, where it was held, among other things:

> "Further, if we were in error in treating the acts of these two partners as preferences and as a wrongful appropriation of assets equitably belonging to the partnership creditors to the use of a single creditor of that class, it cannot escape attention that the practical effect of the acts of these partners is the same as it would have been had the partners, as well as the partnership, been adjudged bankrupt, in which case their acts would unquestionably have been open to a charge of technical preference; and in view of the facts already shown that the adjudication actually made resulted in drawing these individual assets into the jurisdiction and administration of the bankruptcy court, and since in every equitable sense these acts were the equivalents of technical preferences, the court itself might well set them aside in virtue of its

> power under Section 5g to 'marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates'."

The reason for giving partnership creditors preference in the distribution of partnership assets is that the law presumes that the partnership obligation was incurred to increase partnership property, and that separate liability was incurred to enhance the property of the individuals partners. And this principle was one, among others, on which this court based its decision in the case of William Schall et al. v. Frederic Camors et al., 251 U. S. 239-254, for it was said by Mr. Justice Pitney:

> "It is insisted by petitioners, further, that because the proofs of the individual claims establish the responsibiltiy of each partner for the frauds, they are liable *in solido* not only as partners, but individually; and that, irrespective of whether the claims are provable in tort for the fraud, they are provable, and were properly proved both against the individual partners and against the firm as claims in quasi contract or equitable debt. But as the basis of a liability of this character is the unjust enrichment of the debtor, and as the facts show that no benefit accrued to the individuals as a result of the frauds beyond that which accrued to the firm, the logical result of the argument is that out of one enrichment there may arise three separate and independent indebtednesses. Doubtless it would be conceded that a single satisfaction would discharge all of the claims; but we are dealing with a situation where, by reason of insolvency, it is not to be presumed that claims will be satisfied in full; and, as already pointed out, the effect of sustaining the right to double proof would be to give pe-

titioners not only a right to share in the partnership assets on equal terms with other partnership creditors, but a participation in the individual assets on equal terms with other individual creditors and in preference to other partnership creditors. Section 5 of the Bankruptcy Act (30 Stat. at L. 547, 548, Chap. 541, Comp. Stat., Sec. 9589, 1 Fed. Stat. Anno. 2d ed. p. 578) establishes on a firm basis the respective equities of the individual and firm creditors. *Hence the distinction between individual and firm debts is a matter of substance, and must depend upon the essential character of the transactions out of which they arise.* And since, in this case, the tort was done in the course of the partnership business, for the benefit of the firm, and without benefit to the partners as individuals, no legal or equitable claim as against the individuals that might be deemed to arise out of it, by waiver of the tort or otherwise, can displace the equities of other creditors, recognized in the Bankruptcy Act, and put petitioners in a position of equality with others who actually were creditors of the individual partners, and of preference over other firm creditors."

Wherefore, it is respectfully prayed that the petition for certiorari of petitioners be denied.

LEWIS R. BRYAN,
E. B. COLGIN,
Solicitors for Respondents.

(15)

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 269

AILEEN E. MITCHELL (SUCCESSOR OF C. MINKWITZ, FORMER TREASURER OF FORT BEND COUNTY, TEXAS), AS TREASURER OF FORT BEND COUNTY, TEXAS, ET AL.,
PETITIONERS,

vs.

J. W. HAMPEL ET AL., TRUSTEES IN BANKRUPTCY, ETC., ET AL., RESPONDENTS.

BRIEF OF RESPONDENTS

—BY—

LEWIS R. BRYAN,
E. B. COLGIN,
Solicitors for Respondents.

C. C. YOUNG PRINTING COMPANY, HOUSTON

SUBJECT INDEX OF MATTER CONTAINED IN BRIEF

	PAGE
Specification of cross-assignment	33
The Argument	4
First Counter-Proposition	13
Second Counter-Proposition	16-17
Third Counter-Proposition	18
Fourth Counter-Proposition	18-19
Fifth Counter-Proposition	22
Independent Proposition	27
Authorities under First Proposition	13
Authorities under Second Proposition	17
Authorities under Third Proposition	18
Authorities under Fourth Proposition	19
Authorities under Fifth Proposition	22
Authorities under Independent Proposition	27

CASES AND AUTHORITIES CITED

Bank v. Cup & Company, 59 Tex. 268	18
Bayne et al. v. Cusimano, 23 So. 361	15
Brown v. Parker, 7 Allen (Mass.) 339	26
Burns v. Parish, 3 B. Mon. (Ky.) 8	26
Clarke v. Rogers, 228 U. S., 534	11
Cyc., Vol. 30, p. 455	15-16
Daniel's Negotiable Instruments, Sec. 303	14-15
Daniel's Negotiable Instruments, Sec. 305	25
Francis v. McNeal, 228 U. S. 695	7
Fowler Commission Co. v. Charles Land & Co., 284 S. W. 314	8, 17
Fourth National Bank v. Mead, 216 Mass. 521	15
Fort Pitt Coal & Coke Co. v. Diser et al., 239 Fed. 443	19, 20
Green v. Skeel, 2 Hun. 487	26
Huntington v. Knox, 7 Cush. 373	26
In re Faulkshire, 153 Fed. 503	12
In re Adams v. Hoyt Co., 164 Fed. 489	12

PAGE

In re Mosier, 112 Fed. 138 23
Laning v. Iron City National Bank, 36 S. W. 431 9
Laning v. Bank, 36 S. W. 341 18
Lamoyle Co. National Bank v. Stevens, 107 Fed. 245 23
Lerned v. Johns, 9 Allen 419 26
Minor v. Mechanics Bank, 1 Pet. 64 11
Meyer v. International Trust Co., 273 U. S. 382 ..... 14, 17
Metcalf v. Williams, 104 U. S. 98 25
McKee v. Hamilton, 33 Ohio St. 7 26
Revised Statutes of Texas, Art. (old) 2443, (new) 2547 ..... 4, 13
Revised Statutes of Texas, 1914, Art. 6147 18
Revivsed Statutes of Texas 1925, Art. 6111 18
R. R. Co. v. Benedict, 5 Gray 561 26
R. C. L. Vol. 6, p. 1036 29
Robertson v. Boyd, 60 O. St. 57 30
3 R. C. L. 214 24
Swartz v. Siegel, 117 Fed. 13 11
Sec. 5, Sub. g, Bankruptcy Act 19
Schall v. Camors, 251 U. S. 239 21
Sanger v. Warren, 91 Tex. 482 ..... 25, 26
Slawson v. Loring, 5 Allen 342 26
Traer v. Clews, 115 U. S. 528 10
Trinity Portland Cement Co. v. Lion Bonding & Surety Co., 229 S. W. 483 ..... 16, 17
Texas L. & C. Co. v. Carroll & Iler, 63 Tex. 51 25
Thweatt v. Jones, 1 Rand (Va.) 328 30
Weaver v. Tapscott, 9 Leigh (Va.) 424 26
Wilson v. City Bank of St. Paul, 17 Wall. 473 10

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vs.

J. W. HAMPEL ET AL., TRUSTEES IN BANKRUPTCY, ETC., ET AL., RESPONDENTS.

BRIEF OF RESPONDENTS

The statement of petitioners is in the main correct, and no necessity exists for repetition of facts already stated. For convenience, respondents will employ the same abbreviations and designating terms as used by petitioners whenever necessary to do so.

As the bond is in part the basis of controversy, it is

deemed proper to set it out in full for the convenience of the court. It is as follows:

"THE STATE OF TEXAS,
"COUNTY OF FORT BEND.
"KNOW ALL MEN BY THESE PRESENTS:

"That we, J. H. P. Davis & Company, Bankers, unincorporated, of Fort Bend County, Texas, as principal, and J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff, E. Foerster, T. B. Wessendorff, T. W. Davis, R. H. Darst, A. P. George, Real F. Ransom and J. W. Slavin, as sureties, are held and firmly bound unto C. D. Myers, County Judge of Fort Bend County, Texas, and to his successors in office, in the penal sum of Three Hundred Thousand and No/100 ($300,000.00) Dollars, for the payment of which well and truly to be made in lawful money of the United States of America, we hereby bind ourselves, our heirs, executors and administrators firmly by these presents, both jointly and severally.

"Signed with our hands, sealed and dated this..... day of February, A. D. 1921.

"The conditions of the foregoing obligation are such that whereas the above bounden principal, J. H. P. Davis & Co., Bankers, Unincorporated, was on the 15th day of February, A. D. 1921, duly and legally chosen by the Commissioners Court of Fort Bend County, Texas, as County Depository for said county for a period of two years, ending sixty (60) days after the time fixed by law for the next selection of a depository, upon its bidding and agreeing to pay to the County of Fort Bend interest on daily balances in said Depository of said County of Fort Bend at the rate of (6%) per cent per annum, said interest payable monthly.

"Now, therefore, if the above bounden principal, J. H. P. Davis & Co., Bankers, Unincorporated, shall faithfully do and perform all the duties and obligations devolving on it by law as the County Depository of Fort Bend County, and shall, upon presentation

pay checks drawn on it by the County Treasurer of Fort Bend County, Texas, shall faithfully keep and account for all funds belonging to the county which are deposited with it, and all other funds deposited with it, and all other funds deposited with it under the requirements of Chapter II, Acts of the Thirty-fifth Legislature passed at its regular session, and shall pay the interest at the time and at the rate hereinabove stipulated; and shall at the expiration of the term for which it has been chosen, turn over to its successor all the funds, property and other things of value coming into its hands as such depository, then and in that event this obligation is to become null and void, otherwise to remain in full force and effect.

"Any suits arising out of or in any way connected with this bond shall be tried in the County of Fort Bend and State of Texas, in any court therein having jurisdiction of the subject-matter.

"In witness of all of which we have hereunto set our hands and the said J. H. P. Davis & Co., Bankers, Unincorporated, has caused these presents to be signed with its name by its president, and attested and sealed with its corporate seal the day and year first above written.

"J. H. P. Davis & Co.,
"By J. H. P. Davis,
"President, as Principal,
"E. Foerster,
"R. E. L. Wessendorff,
"J. H. P. Davis,
"T. A. Wessendorff,
"T. B. Wessendorff,
"T. W. Davis,
"R. H. Darst,
"A. P. George,
"Real F. Ransom,
"J. W. Slavin,
"As Sureties."

The bond for $50,000.00 was substantially and practically of like tenor and effect.

Argument.

J. H. P. Davis & Company, which was a large banking institution at Richmond, Texas, was named and designated as a county depository. Accordingly, in February, 1921, the bank executed two bonds, one for the sum of $50,000, and the other for the sum of $300,000, as shown in the next preceding statement. These bonds were executed under the requirement of Chapter 2, Acts of the Thirty-fifth Legislature, and especially Article 2443 of our Revised Statutes, which reads as follows:

> "Within five days after the selection of such depository it shall be the duty of the banking corporation, association or individual banker so selected to execute a bond or bonds, payable to the County Judge and his successors in affice, to be approved by the Commissioners Court of said county, and filed in the office of the County Clerk of said county, with not less than five solvent sureties, who shall own unincumbered real estate in this State not exempt from execution under the laws of this State of as great value as the amount of said bond (or of as great value as the amount of all of said bonds when more than one bond) and said bond or bonds shall in no event be for less than the total amount of revenue of such county for the next preceding year for which the same are made; provided that nothing herein shall prevent the making of such bond or bonds by a surety company or companies, as provided by law, and payable as herein provided. And provided further that the Commissioners Court may accept in lieu of such real estate or surety company surety bonds of the United States, or of the State of Texas,

or of any county, city, town or independent school district in the State, which shall be deposited as the Commissioners Court may direct, the penalty of said bond or bonds not to be less than the total amount of the annual revenue of the county for the years for which said bond or bonds are given, and shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon such depository, and for the payment upon presentation of all checks drawn upon said depository by the County Treasurer of the County, and that said county funds shall be faithfully kept by said depository and accounted for according to law. Any suits arising thereon shall be tried in the county for which such depository is selected."

An examination of the bonds in question discloses that J. H. P. Davis & Company executed these bonds as principal and that all of the individual names recited in said bonds were evidenced by signatures signed as sureties for their principal, J. H. P. Davis & Company; there were ten sureties, among whom were four members constituting the partnership known as J. H. P. Davis & Company. J. H. P. Davis & Company in both of the bonds themselves is designated as the principal and throughout the bonds is shown to be the bounden principal. For instance, the clause; "That, whereas, the above bounden principal, J. H. P. Davis & Company," etc., and again, the clause, "Now, therefore, if the above bounden principal, J. H. P. Davis & Company, shall do and faithfully perform," etc., and again, the clause, "And shall, at the expiration of the term for which it has been chosen, turn over to its successor all of said property and other things of value coming into its hands as such depository," etc. In the closing paragraph it appears that J. H. P.

Davis & Company has caused the presents to be signed with its name and by its president; and none of the individuals who have undertaken to sign as sureties appear to have been bound as principal, or to have been designated as such, either expressly or by any words or implication. On the other hand, the bonds themselves affirmatively show that the individuals who signed same in addition to J. H. P. Davis & Company were purporting to act in the capacity of sureties. This is manifest by the words "as sureties" appearing after the recital of their names in the body of the bonds, as well as after the last signature of the individuals. Conclusively and affirmatively, therefore, these bonds were executed by J. H. P. Davis & Company as principal and by the individuals whose names appear thereon, purporting to act as sureties. A careful analysis of Article 2443 of our Revised Statutes cannot but convince the thinking mind that a well defined policy was therein declared of requiring not less than five solvent sureties, who shall own unencumbered real estate in Texas not exempt from execution under the laws of the State of as great value as the amount of bonds, and that these sureties were in nowise to be halfway sureties, but persons who were not already obligated for the amount desired to be secured. It provides for bonds by surety companies, and the acceptance in lieu of bonds of such real estate of such county, security bonds of the United States, or the State of Texas, or of any county, city, town or independent school district in the State which shall satisfactorily secure the money deposited with the bank. The question, therefore, that presents itself is whether or not the individual members of the firm could become sureties for the partnership to such

an extent as to bind their individual estates by giving priority and preference to the obligee in the bonds over the other general creditors of the partnership.

Prior to the decision or the United States Supreme Court in the case of Francis v. McNeal, reported in 228 U. S. 695, rendered on May 26th, 1913, there were frequent judicial holdings that within the scope of the Bankruptcy Act a partnership was an entity separate and distinct from the members who composed it, and that, therefore, when a partnership was adjudicated a bankrupt, the individual estates of the parties who composed the partnership were not drawn into the administration of bankruptcy. However, the McNeal case by the Supreme Court overthrew all those decisions which announced the erroneous principle mentioned. Mr. Justice Holmes, in delivering the opinion for the court, had occasion to say:

> "But we do not perceive that the clause imports that the partnership could be in bankruptcy and the parties not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for it continuing out. The necessary and natural meaning goes no further than that."

Again he said:

> "Finally it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between the firm and members under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts of use in which the discharge is granted. If, as in the present case, the partnership and individual estates

> together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the Act, is to administer both in bankruptcy."

In other words, this decision has set at rest the false notion that there was any distinction between the partnership and the members who composed it. In our State, common law rules in respect to partnerships have been abolished, and contracts of partnership are joint as to all of the partners and several as to each of them. So that it is not necessary in this State for a creditor of the partnership to sue the partnership in order to hold any individual members personally liable on the indebtedness. A creditor of the firm may sue all of the partners, or may sue just one of the partners in his individual capacity, and in the latter case without proceeding at all against the partnership. This was the specific holding in Fowler Commission Company v. Charles Land & Company, decided by the Commission of Appeals and approved by the Supreme Corut, 248 S. W. 314.

It follows, therefore, that in Texas, where this contract was made, with all of its laws which apply thereto becoming part of it, there can be no distinction, whether in bankruptcy or otherwise, between an individual member of the partnership and the partnership itself. The conclusion, therefore, which is reached, is that inasmuch as every individual member of the partnership becomes bound, jointly and severally, when J. H. P. Davis & Company signed the bond in question as principal, it would be a legal absurdity to hold that the members of the partnership could become sureties for the partnership and thereby surety for themselves. It seems to us that

we are reinforced in the conclusion thus reached when it is considered that under our substantive law a member of the partnership may not become a surety for the partnership, for while the question was not directly decided, it is significant that in Bank v. Cupp & Company, 59 Tex. 268, it was held that a stockholder of a corporation could sign an attachment bond as surety thereon *because he was not a partner,* and the corporation was a distinct entity from the stockholders. The clear implication is that if it had been a partnership the holding of the court would have been otherwise. To the same effect is the case of Laning v. Iron City Nat'l Bank, 36 S. W. 431.

Another serious objection to the members of the partnership becoming sureties for the firm lies peculiarly in the fact that Article 2443 of our Revised Statutes requires that this bond shall be signed with not less than five solvent sureties who shall own unencumbered real estate. Certainly it would be against a plain public policy to accept the individual members of a partnership on the bond of the firm under this article, even though and notwithstanding that the individual members possess separate or individual estates and unencumbered lands in addition to the holdings in a partnership. The members of the partnership are already obligated severally as absolutely and with as much far-reaching effect by the execution of the bond by J. H. P. Davis & Company as though they had each signed their individual names as partners. Of what avail then can it be to obtain as sureties members of the firm who are already individually and severally bound on the obligation? They are bound severally so absolutely and to such an extent that the County of Fort Bend could have proceeded to sue any one of these

partnership members individually or severally without suing the partnership. It seems to follow logically that when the individual members of the partnership of J. H. P. Davis & Company signed their names on this bond as sureties they added no strength or credit to it, and gave it no value, and their names or signatures to all intents and purposes should be considered as mere surplusage.

But be that as it may, the general intendment of the Bankruptcy Act of 1898 as expressed in clear and unambiguous language is to only allow a proof of such debts against the individual estate of the member of the partnership as in fact constitute separate and independent obligations as contradistinguished from obligations of the partnership. For certainly if Congress had intended that the words *individual debts* should mean and include obligations created by indorsement, suretyship or guaranty, it would have so declared in unmistakable language. To give to these words a meaning different from that which was given by the Fifth Circuit Court of Appeals in the instant case would be to defeat the very purpose of an equitable distribution of the property of the bankrupts among their creditors. For the primary object of the Bankruptcy Act is to secure a just distribution of the bankrupt's property among his creditors, and it may be said that the secondary object is the release of the bankrupt from the obligation to pay the debts of creditors. This was so stated of the Act of 1867 in Wilson v. City Bank of St. Paul, 17 Wall. 473, 21 U. S. (L. Ed.) 723. And of the present Act it was again reiterated by this court in Traer v. Clews, 115 U. S. 528, that its object was to secure equitable distribution among the creditors.

Courts should strive to give to statutes that construe-

tion which carries into effect the true intent and object of Congress in its enactment. Minor v. Mechanics Bank, 1 Pet. 64, 7 U. S. (L. Ed.) 47. Again, courts will be slow in adopting a construction which would result in great hardship to creditors with highly meritorious claims. Clarke v. Rogers, 228 U. S. 534.

Nothing but a forced and strained construction of the section in question will enable double proof under the facts of this case. The ordinary meaning of individual debts is in fact such debts for which the individual is made primarily responsible consisting of independent undertakings and obligations. Such as are contracted in his own business or in transactions which are individual in character. Or where, under the substantive law of a state, an individual is allowed to create an obligation against his individual estate in a partnership transaction.

The so-called American rule allowing double proof is an artificial offshoot born of a technical analysis of the old equity rule of marshaling of assets. Its effect is the unjust enrichment at the expense of the partnership creditor. A sound public policy and the general polity of equity jurisprudence, so to speak, should not contemplate the unjust enrichment of one creditor at the expense of another. Congress never had in mind that the doctrine of super-added security resulting in double proof where there is a partnership transaction should ever exist or be applied by the courts of bankruptcy. The so-called American rule is too technical, artificial and unjust to find favor in a court of equity. As was substantially and in effect said in the case of Swartz v. Siegel, 117 Fed. 13: "Where language is plain and unambiguous it should be given its ordinary meaning." Individual debts

are such debts as are contracted by the individual in his own business, and which are in nowise related to a partnership transaction. The statutes of fraud speak of standing good for the *debts, default or miscarriage of another.* "Individual debts" ordinarily interpreted would signify not the debts of another, but that of the individual contracting them. The section in question is plain and unambiguous, and should be given its ordinary meaning. Again, courts will at all times adopt that construction which tends to pro-rate equity and equality in the distribution of the bankrupt's estate among his creditors.

In Re: Faulkshire, 153 Fed. 503.
In Re: Adams v. Hoyt Company, 164 Fed. 489.

Congress never even indirectly intended to allow double proof under the facts presented herein, but only where there was both a partnership obligation and an individual undertaking, not based on a partnership transaction.

Respondents will now attempt briefly to answer seriatim the propositions submitted by petitioners.

First Counter-Proposition.

There is no merit to any of the propositions submitted by petitioners because the decision of the Circuit Court of Appeals for the Fifth Circuit properly determined the rights of the parties to a non-negotiable contract, an indemnity bond wholly the creature of the statutory law of the State of Texas, in accordance with the law of the State of Texas.

Authorities.

Vernon's Sayles' Civil Statutes 1914, Art. 2443.
Revised Statutes of the State of Texas, 1925, Art. 2547.

The foregoing statute provides as follows:

"Within five days after the selection of such depository it shall be the duty of the banking corporation, association or individual banker so selected to execute a bond or bonds, payable to the County Judge and his successors in office, to be approved by the Commissioners Court and Comptroller and filed in the office of the Clerk of said county, with not less than five solvent sureties, who shall own unincumbered real estate in this State not exempt from execution under the laws of this State of as great value as the amount of said bond, or of as great value as the amount of all of said bonds when more than one bond; and said bond or bonds shall in no event be for less than the total amount of revenue of such county for the next preceding year for which the same are made. Nothing herein shall prevent the making of such bond or bonds by a surety company or companies, as provided by law, and payable as herein provided. The Commissioners Court may accept in lieu of such real estate or surety company, security bonds of the United States, or of this State or of any county, city, town or independent school district in the State, which shall be deposited as the Commissioners Court may direct, the penalty of said bond or bonds not to be less than the total amount of the annual revenue of the county for the years for which said bond or bonds are given, and shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon such depository, and for the payment upon presentation of all checks drawn upon said depositary by the County Treasurer of the County, and that said county funds

> shall be faithfully kept by said depository and accounted for according to law. Any suits arising thereon shall be tried in the county for which such depository is selected."

This court in Meyers v. International Trust Company, 273 U. S. 382, opinion by Mr. Justice Sandford, had occasion to determine whether an indorsement by a partner on the note of a partnership in Massachusetts created an individual liability. The conclusion reached was that it did, because it was settled under the law of Massachusetts that a partner who indorses a firm note as an individual incurs—in addition to the liability for partnership debts arising from his membership in the firm—a distinct and separate liability. Probably this application of the substantive law of Massachusetts by this court will explain the authorities cited by the petitioners as being in conflict with the decision of the Fifth Circuit Court of Appeals. Most States have adopted the Uniform Negotiable Instruments Law. Under it, as well as under the old Law Merchant, a partner who becomes a surety on a partnership note creates a separate and distinct obligation from that as partner, because this character of paper is intended to pass in channels of commerce without question to facilitate trade, and no person taking such paper in payment for goods, perhaps far distant from the place of its origin or the residence of its maker and indorser, should be required to ascertain whether the indorsement gives it any added security. This is forcibly expressed in Daniel on Negotiable Instruments, Section 303, where it is said:

> "No party can be charged as principal upon a negotiable instrument unless his name is thereon disclosed.

> The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment; it is 'courier without luggage,' whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal party thereto unless his name in some way is disclosed upon the instrument itself; although upon other written contracts, not negotiable, it is often competent to show that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that he should be bound. And in such cases he is bound upon them accordingly."

Again, it was said in the case of Fourth National Bank v. Mead, 216 Mass. 521, 104 N. E. 377, that a member of a partnership placing his name on the back of a firm note "is a person not otherwise a party" to the instrument within the meaning of the Negotiable Instruments Act, and will make him liable as indorser.

In Bayne et al. v. Cusimano, 23 So. 361, the Supreme Court of Louisiana decided:

> "Mr. Bayne then is the principal in the attachment obligation. He is bound on the bond in that character. How could he be both principal and surety at one and the same time in the same obligation and for the same liability?"

Again, in Nashville Saddlery Company v. Green, 89 So. 816, the court, in speaking of a member indorsing a partnership note, said:

> "That a person may be a surety on his own note is not conceivable."

In 30 Cyc. 455, we read:

> "The law merchant adopted the civil law conception

> of a firm as a legal entity, and permitted the indorsement of negotiable paper which was made by a firm to a partner or by a partner to his firm with the same effect as though the parties to the paper were strangers."

Hence it is clear that the decisions giving the holder of negotiable notes executed by a partnership and indorsed by the individual members of the firm the right to double proof are not in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in this case, since this suit involves a statutory bond on which the partners could not obligate themselves individually in contradistinction from their individual or several liability as partners thereon as principals. This is the rule in Texas, and that rule is a part of the bond. The Commission of Appeals of Texas, on March 9th, 1921, in a decision styled Trinity Portland Cement Company v. Lion Bonding & Surety Company, 229 S. W. 483, which decision was adopted and entered by the Supreme Court of the State of Texas as its judgment, held:

> "The principles and rules of law applicable to the construction of contracts are so elementary and so familiar to the profession that it is unnecessary to set them forth. It is sufficient to say that all parties in anywise connected with the contract were presumed to know the law, and that the instruments above quoted from must be construed together, and be construed also in connection with the statute above cited, which by conclusive implication of law was written into the contract and became as much a part of the bond as though it were expressed therein, and the bond must be read and understood in the light of it."

Second Counter-Proposition.

There is no merit to any of the propositions submitted

by petitioners, because the substantive law of the State of Texas, where the contract (bond) was executed and was to be performed, determined whether the members of the co-partnrship of J. H. P. Davis & Company could become sureties on the foregoing statutory bond, and whether by attempting to sign as sureties on the foregoing statutory bond they created any individual obligation in favor of Fort Bend County, and the sureties on said bond who were not members of the firm in contradistinction from their individual obligations as members of the co-partnership of J. H. P. Davis & Company.

Authorities.

Samuel A. Meyers v. International Trust Co., 273 U. S. 372.

Trinity Portland Cement Co. v. Lion Bonding & Surety Company, 229 S. W. 483.

Fowler Commission Co. v. Chas. Land & Company, 248 S. W. 314.

In the Fowler case, cited *supra*, the court said:

> "In this State, common law rules have been abolished, and the contracts of partnership are joint as to all of the partners and several as to each of them. A holder of a claim against a partnership may proceed against any of the partners individually, and it is not necessary to join either of the other partners or the partnership. As between the partners, equity may require a marshaling of joint assets in payment of joint liabilities, or require contribution from one member to another, where a partner has been required individually to pay a partnership debt, but this does not limit the right of creditors to select any individual of the firm and collect their claims wholly from his individual property."

The foregoing is the latest expression of the Supreme

Court of Texas as to the legal status of the partnership and the individual partners, and reaffirms what has been the rule in Texas for an indefinite period in the past.

Third Counter-Proposition.

There is no merit to any of the propositions submitted by petitioners, because under the substantive law of the State of Texas the members of the co-partnership of J. H. P. Davis & Company were jointly and severally liable to the creditors of the firm, and they could not make themselves individually liable in contradistinction from their individual liability as such members of the firm by attempting to become sureties on their co-partnership bond, the debt created by the bond being exclusively for the benefit of the partnership.

Authorities.

Vernon's Sayles' Civil Statutes, 1914, Art. 6147.
Revised Statutes of Texas, 1925, Art. 6111.
Fowler Commission Co. v. Charles Land & Co., 248 S. W. 314.
Bank v. Cup & Company, 59 Tex. 268.
Laning v. Bank, 36 S. W. 431.

Fourth Counter-Proposition.

There is no merit to any of the propositions submitted by petitioners, because the assets of the partnership and assets of the individual partners having been drawn into the administration of the bankruptcy court, the Circuit Court of Appeals for the Fifth Circuit, in refusing to allow the claim of Fort Bend County and the sureties on the depository bond who were not members of the partnership to be approved for the full amount of $334,136.24 against both the partnership estate of J. H. P. Davis &

Company and the individual estates of the partners, correctly prevented, under Section 5, Subdivision (g), of the Bankruptcy Act, Fort Bend County, and the said sureties from getting in every equitable sense an inequitable preference, and has thereby secured to all creditors an "equitable distribution of the property of the several estates" as intended by said section of the Bankruptcy Act.

Authorities.

Section 5, Subdivision (g), Bankruptcy Act.
Fort Pitt Coal & Coke Co. v. Diser et al., 239 Fed. 443.
Schall v. Camors, 251 U. S. 239.

It seems that Section 5, Subdivision (g), of the Bankruptcy Act, gives the court power to

> "marshal the assets of the partnership estate and individual estates so as to prevent preference and secure the equitable distribution of the property of the several estates"

before it becomes the duty of the court to carry out the provisions of Section 5, Subdivision (f), of the Bankruptcy Act. In this case the Circuit Court of Appeals for the Fifth Circuit might have based its decision upon its power to secure the equitable distribution of the property of the several estates given by Subdivision (g) of Section 5 of the Bankruptcy Act, as was done by the Circuit Court of Appeals for the Sixth Circuit in Fort Pitt Coal & Coke Company v. Diser et al., 239 Fed. 443, in which Greer Brothers, a co-partnership composed of John L. Greer and Robert C. Greer, was indebted to the Fort Pitt Coal & Coke Company, and on December 31st, 1914, executed a note payable to the Fort Pitt Coal &

Coke Company for $4000 and a note for $373.30, each of which notes was given to cover the indebtedness owing by the partnership, and each of which notes was indorsed by John L. and Robert C. Greer, and the $4000 note was secured by a chattel mortgage upon personal property of the firm and of the individual partners. Judgment was obtained on the note for $373.30 against the partnership and the partners individually. In March of 1915 the partnership was adjudicated a bankrupt, and the estates of the individual partners were drawn into the bankruptcy court for administration, though the individual partners were not adjudicated bankrupts. The bankruptcy court held that technical preferences had been given to the Fort Pitt Coal & Coke Company, and disallowed the claim against the individual estates. The case was appealed to the Circuit Court of Appeals for the Sixth Circuti, where it was held, among other things:

> "Further, if we were in error in treating the acts of these two partners as preferences and as a wrongful appropriation of assets equitably belonging to the partnership creditors to the use of a single creditor of that class, it cannot escape attention that the practical effect of the acts of these partners, as well as the partnership, been adjudged bankrupt, in which case their acts would unquestionably have been open to a charge of technical preference; and in view of the facts already shown that the adjudication actually made resulted in drawing these individual assets into the jurisdiction and administration of the bankruptcy court, and since in every equitable sense these acts were the equivalents of technical preferences, the court itself might well set them aside in virtue of its power under Section 5g to 'marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates'."

The reason for giving partnership creditors preference in the distribution of partnership assets is that the law presumes that the partnership obligation was incurred to increase partnership property, and that separate liability was incurred to enhance the property of the individual partners. And this principle was one, among others, on which this court based its decision in the case of William Schall et al. v. Frederic Camors et al., 251 U. S. 239-254, for it was said by Mr. Justice Pitney:

> "It is insisted by petitioners, further, that because the proofs of the individual claims establish the responsibility of each partner for the frauds, they are liable *in solido* not only as partners, but individually; and that, irrespective of whether the claims are provable in tort for the fraud, they are provable, and were properly proved both against the individual partners and against the firm as claims in quasi contract or equitable debt. But as the basis of liability of this character is the unjust enrichment of the debtor, and as the facts show that no benefit accrued to the individuals as a result of the frauds beyond that which accrued to the firm, the logical result of the argument is that out of one enrichment there may arise three separate and independent indebtednesses. Doubtless it would be conceded that a single satisfaction would discharge all of the claims; but we are dealing with a situation where, by reason of insolvency, it is not to be presumed that claims will be satisfied in full; and, as already pointed out, the effect of sustaining the right to double proof would be to give petitioners not only a right to share in the partnership assets on equal terms with other partnership creditors, but a participation in the individual assets on equal terms with other individual creditors and in preference to other partnership creditors. Section 5 of the Bankruptcy Act (30 Stat. at L. 547, 548, Chap. 541, Comp. Stat., Sec. 9589, 1 Fed.

Stat. Anno. 2d. p. 578) establishes on a firm basis the respective equities of the individual and firm creditors. Hence the distinction between individual and firm debts is a matter of substance, and must depend upon the essential character of the transactions out of which they arise. And since, in this case, the tort was done in the course of the partnership business, for the benefit of the firm, and without benefit to the partners as individuals, no legal or equitable claim as against the individuals that might be deemed to arise out of it, by waiver of the tort or otherwise, can displace the equities of other creditors, recognized in the Bankruptcy Act, and put petitioners in a position of equality with others who actually were creditors of the individual partners, and of preference over other firm creditors."

Fifth Counter-Proposition.

There is no merit to any of the propositions submitted by petitioners, because under the present Bankruptcy Act double proof is allowable only where a creditor holds two distinct obligations, (a) the obligation of the firm as such, and (b) the obligation of the individual not linked with the partnership transactions, and therefore independent in character.

Authorities.

Section 5, sub F and G of the Bankruptcy Act.

The above counter-proposition is sustained by the following cases:

J. W. Hampel et al., Trustees in Bankruptcy, v. C. Minkwitz, as Treasurer of Fort Bend County (see Tr. p. 70), which in clear and logical exposition of thought announced the broad and equitable rule that double proof was not allowable if the guaranty, suretyship

or indorsement relates to a transaction of the partnership of which the individual, undertaking to bind himself, was a member.

In LaMoylle County National Bank v. Stevens (1901), 107 Fed. 245, Judge Wheeler said in part:

> "The question here is whether these debts, if any, were at the time of the adjudication as between the individual and the firm, the joint debts of the individual or the joint debts of the firm, and not whether the individuals were in any way liable for the debts. As to the first note, the claim is sought to be made individual through the separate indorsement of C. P. Stevens. But it was primarily a partnership note, and so far as in anywise made to appear a partnership debt; and if Stevens' liability as indorser had been fixed, it would still be apparently a partnership debt."

In this case the other note was signed individually on the back, and it was attempted to hold the signer as a co-maker, but the court decided that the evidence rebutted this theory and predicated the decision on the ground that it was a partnership debt, and that, therefore, double proof was not allowable.

In re Mosier (D. C. O.), 112 Fed. 138:

> "The joint and several notes given by the parties for partnership liabilities are none the less partnership debts, because the partners are also individually liable. By the terms of the same section of the bankruptcy act, no part of the separate property is to go for partnership debts until all separate debts are fully paid. Therefore, there can be no individual assets of Mosier in which these partnership creditors can be entitled to participate."

Again, in the case of in re C. H. Kendrick & Company,

226 Fed. 978, it was announced that where the individu
members of the partnership contracted a partnership de
it constituted no justification to allow proof against t
individual estate of the firm.

In 3 R. C. L. 214:

> "And the general result of the bankruptcy cases
> the United States is that while they cannot be said
> deny the right to make double proof of a mere joi
> and several obligation, they have not allowed
> course to both estates, except where the double clai
> was based upon this joint obligation of a firm, a
> also an independent obligation of the individu
> partner."

At most, the apparently adverse decisions cited by p
titioners even with reference to the binding of the se
arate estates for individual acts in reference to a pa
nership obligation is grounded upon the most flimsy fi
tion and implication of security that it is conceivable
express. In our humble opinion the weight of reaso
if not the weight of decision, is with the authorities whi
hold that the true test is whether or not it was a pa
nership obligation or an individual obligation. Howeve
waving aside the question of soundness and satisfacto
accountability for these seemingly adverse authorities,
is indeed noteworthy that in the line of decisions whi
bind the individual members of a firm for the payme
of a partnership obligation, the partner has invariab
and without exception become an indorser or surety f
the firm on a negotiable instrument, or that he has act
individually as a principal and co-maker in stated ter
and expressed language on a promissory note. It is el
mentary that if an individual should sign in his own nam
a contract not negotiable in character, the payee cou

hold him at his election individually or could sue the undisclosed principal, if he in fact had acted for payor. To illustrate this exception: If John Smith should sign as maker a promissory note for some third person, the latter could not be liable on the note. Texas L. & C. Co. v. Carroll & Iler, 63 Tex. 51; Sanger v. Warren, 91 Tex. 482; Metcalf v. Williams, 104 U. S. 98.

In the Carroll case, 63 Tex. 51, cited *supra*, the court, in the course of its opinion, held as follows:

> "The general rule is that an agent should execute a contract in the name of his principal, and in reference to negotiable instruments it is well settled that no one can be charged thereon unless his name appears as a party to the paper in some relation. Daniels on Neg. Inst. 303.
>
> "This rule, however, in reference to negotiable paper, arises from the nature of such paper, and the uses for which it is intended.
>
> "Such paper is expected and intended, if it be necessary or convenient for the holder to do so, to be transferred and to pass into the hands of various persons, and for the security of all who may deal with it, it is necessary that it should show upon its face the liability of every person who is bound for its payment; for it is upon what appears from the paper to be the true relation of persons to it that successive holders contract.
>
> "In relation, however, to paper not by the law merchant deemed negotiable this rule does not prevail, and upon 'written contracts not negotiable it is often competent to show that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that he should be bound. And in such cases he is bound upon them accordingly.' Daniel on Neg.

> Inst., 305; Lerned v. Johns, 9 Allen, 419; Brown v. Parker, 7 Allen (Mass.) 339; Huntington v. Knox, 7 Cush. 373; Slawson v. Loring, 5 Allen 342; Railroad Co. v. Benedict, 5 Gray 561; Green v. Skeel, 2 Hun. 487."

Our Supreme Court again, in the case of Sanger v. Warren, 91 Texas 482, announced the same rule. It said:

> "It is well settled that the rule (holding liable the undisclosed principal) never had any application to negotiable instruments, no one being chargeable thereon 'unless his name appears as a party to the paper in some relation.' Authorities above cited."

Some of the courts relax this rule when an individual partner signs a note which is in reality for the partnership, as in that instance, on the principle that a partner can bind the firm and not on the doctrine of undisclosed principal, the partnership is liable. Burns v. Parish, 3 B. Mon. (Ky.) 8; McKee v. Hamilton, 33 Ohio St. 7; Weaver v. Tapscott, 9 Leigh (Va.) 424. In such case the maker is liable as a partner, but the distinction applied remains unchanged.

Respondents submit their independent proposition on the question of contribution to be considered by the court only in the event it is held that double proof is allowable under the facts of this case.

Independent Proposition.

A member of a partnership firm who has signed a statutory county depository bond as surety for the partnership, insofar as his separate individual estate is concerned, is on an equal footing and terms with the other sureties who are not members of the partnership, in reference to the payment of any loss sustained by the

obligee under the bond. This is essentially true, if in his individual capacity as surety and for the purpose of giving additional security to the obligation he can bind his separate estate, since, if he is to be a distinct entity individually in this respect in order to give additional security to the creditor, he is likewise to be considered a distinct entity from the partnership in his relation with his co-sureties, and is accordingly entitled to invoke the doctrine of contribution.

Authorities.

The theory on which opposing counsel seeks to escape from the doctrine of equitable contribution appears to be on the legal proposition that contribution arises only between parties whose situations are equal. Generally speaking, this is a correct exposition of the law, but in order to arrive at the conclusions which create an inequality of situations, the claimants must shift or reverse the view originally taken, viz, that a member of a partnership, while already jointly and individually liable for a partnership indebtedness, can nevertheless give a super-added security by signing in his individual capacity. This in effect, for the purpose of super-added security, would constitute a member of the partnership insofar as relates to his separate estate a distinct entity from the partnership itself. If he is to be regarded as a distinct entity from the firm of which he is a member, for the purpose of giving super-added security, and binding his separate estate, then in justice and by way of consistency he should be treated as a distinct entity from the firm when the question of equitable contribution arises as among the co-sureties for a loss sustained on a bond given by the partnership. It is true that when the partnership exe-

cuted the bond that each individual partner is charged with a direct and primary liability for the loss which may be sustained thereunder. This it is that renders it difficult for the thinking mind to understand how the partner may become a surety for the partnership. He can give it no greater security, nor make himself one bit more liable than he was by the signing of the bond on the part of the partnership. But, if the decisions which attempt to clothe the partner with a different entity when he contracts in his individual capacity in matters solely pertaining to the business of the partnership does in fact give the so-called super-added security against his separate estate, then it would but seem the natural presumption and inference of reason that since he is considered a different person while acting in the capacity of a surety for the principal, he should likewise be considered a different person when the question of equitable contribution crops out of the loss sustained by the obligee in the bond. We cannot start out our story in prehistoric dawn and bring into play the use of firearms and set our scene in this day of modern civilization. There can be no anachronism. The allegory must likewise be consistent. And if this is true in fiction, how much more true should it be when the human mind is employed to adjust the differences of litigants according to principles conceived and practiced by the mind trained in law. If the legal mind creates a fiction in order to arrive at a given conclusion, should it not be consistent enough to use the fiction throughout all related matters? The only manner in which the partner can be held to have become liable is on the theory of distinct entity, and therefore super-added security; should petitioner not be consistent enough to use the fiction

which has thus been reared to create distinct entities where none existed before. And most certainly once this fiction has been created and the distinct entity of character made to appear on the legal stage, it cannot be discarded without doing violence to both reason and justice.

In 6 R. C. L. 1036 it is said:

> "2. *Nature and Basis of Doctrine.*—It is a familiar principle that, when several parties are equally liable for the same debt, and one is compelled to pay the whole of it, he may have a contribution against the others to obtain from them the payment of their respective shares. It is almost universally conceded that this doctrine is not founded on contract, but on an acknowledged principle of equity, which requires that those who voluntarily assume a common burden should bear in equal proportions. And when any burden ought from the relation of the parties, or in respect of property held by them, to be equally borne, and each party is *in aequali jure*, contribution is due. But it is essential to the application of the principle that the party claiming contribution be *in aequali jure;* if his obligation is primary and that of the defendant secondary only, he cannot have contribution. Contribution presumes the payment and extinguishment of the debt by one for the benefit of all, and it has been held that the whole debt must have been paid before the action for contribution could be maintained, though the contrary doctrine has also been laid down. If, however, the party making payment pays no more than his proportion, he cannot recover contribution, even though his co-debtor has paid nothing."

It will be observed the principle is declared to be also:

> "If his obligation is primary and that of the defendant secondary only, he cannot have contribution."

This declaration of principle is sustained by only one cited authority. Thweatt v. Jones, 1 Rand. (Va.) 328; 10 Am. Dec. 538. An examination of that decision will show that it does not sustain the stated principle. In fact, the case turns upon the following proposition:

> "Where parties are equally bound to bear a burden and are *in aequali jure*, that is, liable from the circumstance existing as to both, contribution is due of right in equity; that this general proposition is liable to one exception; viz: that the parties would otherwise be entitled to such contribution, forfeit such right if the joint liability arose from an act *malum iso se* that failed of voluntary tort, in which he participated; that when it is shown that the parties were originally equally bound, and stood *in aequali jure*, the party who has paid same is entitled, of course, to contribution, unless it be shown on the other side that his right has been forfeited as aforesaid, by his own wrongdoing."

The equality of position which appears to be the prop of the equitable principle is no doubt represented by the common liability of the sureties, or other parties.

The case of Robertson v. Boyd, 60 Ohio St. 57, 53 N. E. 495, laid down the true test when it said:

> "It is not fixed on contract, but arises from the consideration that persons subject to a common duty or debt should contribute equally to the discharge of the duty or debt. * * * The right does not depend upon the order in which each party became liable. The common liability is the crucial test. On the prisage of wine it is immaterial whose wines have been taken. All must contribute equally. So it is when goods are thrown overboard for the safety of a ship; all owners of the goods saved by the act must contribute proportionately to the loss."

But if we should concede for the purpose of the argument that the rule does not apply where one is primarily liable in consequence of an existing relation, and the others not, then it might be urged with logical force that the equitable principle of contribution is of broader scope and comprehension; so that when the act of the one who was already directly and primarilyy liable, created a separate and distinct contract or surety which in its legal effect rendered secondary and subordinate the original direct and primary liability, there should be no sufficient reason in equity why the application of the doctrine should not apply. For while it is true that when J. H. P. Davis & Company signed as principal, each partner became directly and primarily liable, yet if a partner can become a surety for the firm and give priority to the obligee in the bond, which he signed in his individual capacity, over the general creditors, as between the sureties, the principal, the partnership and the individual members thereof, the direct and primary liability created by the act of the partnership in signing as principal has been destroyed to the extent of giving preference to the obligee in the bond of exhausting the separate estates of the individual members of the partnership for the satisfaction of its claim, and therefore rendering secondary this original liability to the subsequent act of suretyship. Keeping in mind the theory of distinct entities, all of these sureties were on a footing of equality and were liable for the common loss sustained by the obligee in the bond, so that the obligee in the bond had a common right to exhaust the individual estates equally and without hindrence for the payment of its claims. The individual estates of all of the sureties, members as well as non-members of the part-

nership, were bound and obligated by a common principle of liability for the payment of the claims; and how then can it be said with good reason or with any degree of satisfaction that they were not sureties *in aequali jure?*

Conclusion.

WHEREFORE, it is most respectfully prayed that the judgment of the Circuit Court of Appeals be in all things affirmed, and in the alternative, that the sureties who were partnership members of the firm in question be allowed contribution under appropriate relief from this court, and for such other relief as to this Most Honorable Court may be deemed necessary or proper.

LEWIS R. BRYAN,
E. B. COLGIN,
Solicitors for Respondents.

Specification of Error.

A member of a partnership firm who has signed a statutory county depository bond, as surety for the partnership, insofar as his separate individual estate is concerned, is on an equal footing and terms with the other sureties who are not members of the partnership, in reference to the payment of any loss sustained by the obligee under the bond. This is essentially true, if in his individual capacity as surety and for the purpose of giving additional security to the obligation he can bind his separate estate since, if he is to be a distinct entity individually in this respect in order to give additional security to the creditor, he is likewise to be considered a distinct entity from the partnership in his relation with his co-sureties. (This is relied on and submitted only conditionally in the event double proof is allowable.)

ADDENDA

Brief Statement Under Independent Proposition, Pages 26-27.

The sureties on bonds involved, not members of the partnership, paid $108,000.00 to Fort Bend County in consequence of loss on bonds. (R. p. 34.)

The Referee in Bankruptcy allowed claim of Fort Bend County for full amount without taking into account credit of $108,000.00 paid by sureties on bonds involved, not members of the partnership (R. p. 56); and this was affirmed by the United States District Court. (R. p. 63.)

This statement was inadvertently omitted and is here inserted under the contention payments should be taken into account under principle contribution.

Office Supreme Court, U. S.
FILED
MAR 5 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 269

AILEEN E. MITCHELL, PETITIONER,

vs.

J. W. HAMPEL ET AL., RESPONDENT.

SUPPLEMENTAL BRIEF.

Whether partnership or individual debts rests upon character of transaction (Schall *v.* Camors, 251 U. S., 239).

Bankruptcy laws did not attempt by any of the provisions to deny a lienholder of any right or remedy. Contracts under which were pledged were valid and enforceable under the laws of New York (Hiscock *v.* Varick, 206 U. S., 28).

The test is whether debts or partnership are individual in character and depends on the transaction from which it arises (Reynolds *v.* N. Y. Trust Co., 188 Fed., 613).

sureties therein received the sole and primary consideration. Kindly read the citation to Cyc. given by petitioners on this point.

In executing the bond the parties were trying to comply with article 2443, shown on page 4, our brief, which required sureties and not joint principals. This statute is a part of the bond itself. J. H. P. Davis & Co., as such, were chosen depository, and not the individuals. The individuals were only liable in the event of a loss and failure of J. H. P. Davis & Co. to pay. All that the joint and several clause did was to give the obligee the right to sue severally (32 Cyc., 89). The individuals did not bind themselves jointly and severally as co-makers, but only as sureties; obligee presumed to know J. H. P. Davis & Co. was principal, it having received benefit of contract (32 Cyc., 39).

Contribution arises in case, as $108,000 was paid by other sureties and county's claim allowed in full, thereby amounting to indirect payment to sureties who made payment.

Respectfully submitted,

L. R. BRYAN.
E. B. COLGIN.

ADDENDA.—Please read Wiggins *v.* Blackshear, 86 Texas, 668, holding law recognizes no personality in a partnership other than that of the persons who compose it.

SUPREME COURT OF THE UNITED STATES.

No. 269.—October Term, 1927.

Aileen E. Mitchell (Successor of C. Minkwitz, former Treasurer of Fort Bend County, Texas), as Treasurer of Fort Bend County, Texas, et al., Petitioners, *vs.* J. W. Hampel, et al., Trustees in Bankruptcy etc., et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 19, 1928.]

Mr. Justice Holmes delivered the opinion of the Court.

J. H. P. Davis & Co. of Fort Bend County, Texas, partners, were adjudicated bankrupts both as a firm and individually. They were bankers and depositories of County funds. As such they had given two joint and several bonds both signed by the firm in its firm name as principal and by some of the members of the firm individually, with others, as sureties. The County sought to prove its claim not only against the firm but also against the separate estates of the surviving members all of whom had bound themselves severally as well as jointly. The double proof was allowed by the District Court but was disallowed by the Circuit Court of Appeals on the ground that the Bankruptcy Act, § 5f, by appropriating the individual estate of a partner to his individual debts excluded by implication debts that were also debts of the partnership from sharing with the former on equal terms. (Act of July 1, 1898, c. 548, 30 Stat. 548. C. Tit. II, c. 3, § 23.) 18 F. (2d) 3.

We are of opinion that the District Court was right. Except so far as the statute may prevent it a solvent man dealing with another for money to be advanced to or deposited with his firm may determine the security to be given as he and the other may agree. He may mortgage his private estate and we perceive no reason why he may not create a claim against it in bankruptcy by

a separate contract of his own. The firm creditors know that they will be postponed to individual creditors, and that they have no voice or knowledge as to who the individual creditors shall be, or what the amount of their claims. The only real equity is not to disturb the equilibrium established by the parties. Those who take less security have no claim to be put on a footing with those who require more. It is not necessary to go into nice speculations as to what a partner can add to the liability already incurred when he offers a separate contract in addition to that which is made by his firm. We may assume that by the firm contract he is bound to the uttermost farthing—but he is bound only as a member of the firm and therefore subject to the bankruptcy rule. His creditor may require more and we can see nothing to hinder his putting himself in the position of a separate debtor also. Certainly we find no prohibition in the bankruptcy law. *Myers* v. *International Trust Co.*, 273 U. S. 380. By making a separate contract although in the same instrument he calls the separate liability into being, as presumably he intends to and as he has a right to do. *Robinson* v. *Seaboard National Bank of New York*, 247 Fed. Rep. 667, 668, 669, *Ibid*, 1007. The intent and transaction are not illegal in Texas. Their specific effect depends on the Bankruptcy Act.

We have dealt with the only question which induced the granting of the writ. It does not appear to us necessary to go into further details.

Decree reversed.

A true copy.

Test:

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